Supreme Court, U.S.
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Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court err in making public policy that sexual assault in a harsh far distant foreign work environment is so highly unusual and extraordinary that the Federal Contractor in U.S. headquarters is excused from negligent retention, supervision and hiring liability even when it refused to heed numerous warnings from its on-site Chief of Party supervisor and security officer of the danger of grave bodily injury to her son and others from an employee who became emotionally unfit, explosive and had already committed battery unless the specific sexual assault is foretold?

2. The Circuit Court ignored Maryland lex loci delicti law which applied Kyrgyz law allowing civil litigation independent of criminal prosecution or conviction of the rape of the Chief of Party's eleven year old dependent in Kyrgyzstan under a Federal Contractor's Visa naming itself responsible for the dependent, housed in company paid apartments, schooled in company paid schools and transported to company functions, offices and apartments when the rape was in the company apartment used to allow the unfit employee, responsible for financial coordination with US Headquarters finance office, to be available during US Headquarters business hours eleven hours behind Kyrgyzstan [Kyrgyzstan weekend 7 pm to 3 am Friday night to Saturday morning is US Virginia business day Friday hours 8 am to 4 pm]. Did the Court err and apply the wrong standard of proof of law in rejecting Kyrgyz law which allowed the case and using inappropriate Maryland case law for smoke

detectors as authority that to hold employers liable for their employee's sexual assault without prior acts of sexual assault of which the employer was aware would destroy the foundation of proximate cause.

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PETITTION FOR A WRIT OF CERTIORARI

Mark Baker respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., infra, A1-16) is not officially reported but is available at 2009 WL 512672 and is reproduced in the Appendix here at A1-16. The district court's order granting respondent's Summary judgment motion (App., Infra, A17—18) is unreported.

BASIS FOR JURISDICTION IN THIS COURT

The court of appeals entered its judgment on December 28, 2009. On January 25, 2010 the court denied a timely petition for rehearing en banc (App., infra, 19-20). On April 22, 2010, the Chief Justice extended the time within which to file this petition until June 24, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Fed. R. Civ. P 44.1 Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination must be treated as a ruling on a question of law.

Federal Rule of Appellate Procedure Rule 32.1.

Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007...

Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009)

SEC. 8116(a)(1) and (2) of the Department of Defense Appropriations Act, 2010 making appropriations for fiscal year ending September 30, 2010 Section 8116(a)(1)-(2)

Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009) reads:

> SEC. 8116(a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:
>
> (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising **3455* out of sexual assault or harassment, including assault and

> battery, intentional infliction of emotional distress, false imprisonment, or **negligent** hiring, supervision, or **retention**; or
>
> (2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or **negligent** hiring, supervision, or **retention**. [Emphasis Added]

Federal Arbitration Act, 9 U.S.C. Section 1 et seq., see Section 3. [FAA]

STATEMENT

This Case involves questions of exceptional importance where the Fourth Circuit Court conflicts with the Fifth Circuit Court that addressed the issue of negligent retention in a rape committed by employees of a large Federal Contractor executing US policy on distant harsh foreign soil where the exact form of danger [rape] was not designated but the out of control status of the employees was reported to U.S. Headquarters by the local supervisor. Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009. [Jones]

The Fourth Circuit Court's opinion classifying sexual assault by a company employee as so highly unusual and extraordinary as to break the chain of proximate cause for employer liability not only

conflicts with the Fifth Circuit **Jones** case but also frustrates the intent of Section 8116(a)(1) and (2) U.S. Defense Appropriations Act, 2010, 123 Stat. 3409, 3455, H.R. 3326 (2009) preserving the right to sue Federal [Defense] Contractors for negligent retention, supervision and hiring. The Fifth Circuit Jones Case and the Federal law show a clear trend that sexual assault is sufficiently common in far flung harsh, high stress foreign countries for workers that it is a problem requiring official recognition. This Federal law takes sexual assault out of being considered "so highly unusual and extraordinary" that a Federal Contractor can evade responsibility for failure to responsibly manage its employees on foreign soil.

Further there are questions of the standard of proof and application of foreign law is in disarray as well as facts overlooked leading to ignoring Maryland's lex loci delicti application of law of foreign site of the tort and public policy application of proximate cause in a domestic products liability case Pittway Corp. v. Collins, 409 Md. 218, 238-9, 973 A.2d 771, 783 (June 12, 2009) to protect Federal Contractors from negligent retention liability.

A. **Factual Background**

This case involves the responsibility of the U.S. Federal Contractor employer headquartered in the Washington Metro area in Virginia for its employee's sexual assault in 1996 of the eleven year old son of his on site in Kyrgyzstan supervisor who was the Chief of Party of the State Department US Agency for International Development (US AID) project for Bankruptcy in Kyrgyzstan and Kazakhstan.

Kyrgyzstan, a former Soviet Union Republic, is presently the staging area of the Afghanistan War and the country has undergone instability and revolutions since the fall of the Soviet Union in 1991. Sexual assault was committed on the child by the Booz Allen employee whom his supervisor had reported as having become dangerously unfit. It occurred in the apartment paid for by Booz Allen for him as their financial officer for the US AID Project in Kyrgyzstan. His duties required him to confer with Virginia Headquarters during business hours of the Headquarters for project financial management. Kyrgyzstan is 11 hours ahead of the Virginia Headquarters. Kyrgyzstan weekend Friday night from 8 pm to 4 am Saturday is Friday business day in Virginia 9 am to 5 pm.

B. Proceedings in District Court

Petitioner filed the Baker v Booz Allen case in Maryland Circuit Court for Montgomery County [6th Circuit CV #268125] within three years of Petitioner turning 18 in 2006. Respondent removed it to the U.S. District Court of Maryland [Baker v. Booz Allen Hamilton, 4/06/06 08:06-CV-00889RWT unreported, Order of D. Ct. Md App. A-17]. The US District Judge Roger Titus granted summary judgment. He determined that Maryland law applied requiring Maryland conflict of law rule lex loci delicti to be applied making Kyrgyz law the law that determined whether a case could be filed and relief was available.

Key to this Decision was a Declaration (A40-43) Defendant filed without producing the laws cited stating that Plaintiff could not file a civil case unless the Booz Allen Employee who molested Plaintiff had first been convicted criminally of buggery and Booz Allen had ordered the employee to molest the Plaintiff who was then an 11 year old child[1]. A40-43. The District Court accepted the Declaration and ruled that Petitioner was barred from bringing a case in Kyrgyzstan. Then, just in case Kyrgyz law did apply, decided Maryland law and Virginia law would not allow the case. (A25-27)

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[1] Defendant's two page Declaration without copies of the law cited opined that Plaintiff could not file civilly in Kyrgyzstan because he had not first obtained a criminal conviction for buggery against the employee and the employer Booz Allen had not specifically told the employee to molest the eleven year old child. A40-43. Upon questioning Defense Counsel assured Judge Titus, he understood that Kyrgyz law only allowed strict respondent superior liability. A21-22 The Declaration cited but did not provide copies of the Kyrgyz Soviet Socialist Republic Civil and Criminal 1960s laws emanating from the former Soviet Union 1936 Constitution and 1999 civil and criminal procedural law cited as Kyrgyz authority. After a year-long search Plaintiff located and produced to the Circuit Court copies of the Defendant cited Kyrgyz laws A32-35 plus pertinent parts of the applicable USSR Constitution A36-38, Learned Treatise A38-40 and Authentication Letter from the Library of Congress, Assistant Dir Legal Research, Chief Eastern Law Division A35-36. The actual laws showed that not only was plaintiff allowed to file a complaint without a conviction for buggery against the Booz Allen Employee, but that Plaintiff, even as a child had a right to sue on his own and the employer organization was responsible for the management of the enterprise including the picking, retaining and supervising of employees who went a field of their duties. A32-40

C. Proceedings in Court of Appeals

Plaintiff appealed the Summary Judgment. After long search Petitioner located and produced the actual laws cited in the incorrect Declaration showing that Plaintiff: could sue in Kyrgyzstan for sexual assault; had a separate right against Booz Allen [even though he was a child then] and Booz Allen as part of their management of their business was responsible for negligent retention of employees who do harm. Kyrgyz law, infra A32-40. Further, the issue of whether the employee action was within the scope of responsibility was a question of fact that relied on factors such as those present in this case that it was committed in apartments paid for by Booz Allen for company availability during Virginia Headquarters business hours. See Addendum, Infra A32-40 for Kyrgyz law and Learned Treatise by Professor Christopher Osakwe A38-40[2]. The unfit employee in his BAH apartment on Friday night in Kyrgyzstan was available to Virginia Headquarters as the on-site financial officer in Kyrgyzstan during Virginia business hours on Friday when the molestation occurred. Defendant appealed the Trial Court's denial of Defendant's motion for sanction. In affirming the District Court, the Circuit Court considered and reasoned.

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[2] Professor Osakwe trained in Russia and he has taught in U.S. law schools, he was Special Counsel to the Kyrgyz Republic President in 1995 funded by the World Bank, Head of US AID in Kazakhstan 1996, and has been Professor of Law at Moscow State University.

> Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. [emphasis] A-15

However, the Court decided,

> In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport [the unfit employee].... BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim...Such a holding would undoubtedly tear the concept of proximate cause from its moorings... A13

This in essence gives Federal Contractors a standard 'license to slap' battery and at what time does licensed slapping battery graduate to employer responsibility. Does it require that the Federal Contractor hire a convicted sexual assailant felon before it is responsible? Does the Federal Contractor get one free sexual assault pass per employee before

it becomes responsible? Here the Fourth Circuit is in conflict with Federal law and the Fifth Circuit which allowed litigation for sexual assault against a Federal Contractor without the prerequisite of hiring a convicted sexual assault felon and previous occurrences of rape on their company premises.

In the *Baker v BAH* case, the dangerous employee's supervisor on-site in the harsh foreign environment did not ask Washington to fire the employee but informed Washington that he was unfit and needed to be removed back to the U.S. before he gravely injured someone. The on-site supervisor specified herself and her 11 year old son as in the gravest danger. The employee had already committed battery and threatened her son that he was going to get him. The Federal Contractor's Virginia Headquarters discursively dismissed the on-site supervisor's warnings as unimportant because it did not involve something important, like theft and did not even investigate. A22-24

The Fourth Circuit affirmed the Trial Court in both appeals in an unpublished opinion. Infra at A1-16. The Circuit Court upheld the Trial Court grant of Summary Judgment but unlike the Trial Court, held that Maryland not Kyrgyz law applied to deny Plaintiff a right to sue. The Circuit Court cited authority of a Maryland smoke-detector case decided after the Fourth Circuit Court briefing of the Baker v Booze Allen Hamilton, Inc., case was finished. Pittway Corp. v. Collins, 973 A.2d 771, 787 (Md.

2009). Neither the Fourth Circuit Court Judges nor the Plaintiff or Defendant mentioned the smoke detector case in oral argument or briefing. Plaintiff believes, the Fourth Circuit Court per curium opinion improperly cited the smoke detector case as authority to hold that sexual assault is so extraordinary and unforeseeable, that a company should not be held responsible for notice of an employee's capability of committing sexual assault based upon warnings of the employee's supervisor in Kyrgyzstan (a faraway country that it is day when it is night in the Booz Allen Washington Headquarters) and instances of the subordinate's commissions of battery because to do so would tear asunder the fabric of proximate cause. Id. at A13

Plaintiff filed Petition for Rehearing en banc citing the conflicting decision in the **Jamie Lee Jones** case in the U.S. Fifth Circuit Court of Appeal which affirmed the Trial Court finding that rather than being a highly extraordinary and unusual occurrence, sexual assault is an important issue when it is perpetrated by company employees in far distant stressful work assignment lands. It is so important that its ability to be litigated is favored even over the strong federal preference for arbitration sought by Defendants in the Fifth Circuit Jones v Halliburton Case. The **Jones** case involved the liability of KBR Headquartered in the US for the rape by its employees of a young KBR employee in IRAQ. KBR had received numerous reports that the work environment and living quarters was out of

hand and dangerous. The injured KBR employee had signed as a condition of employment, an agreement to arbitrate all aspects of the employment. Thus, although a number of issues involving the rape of the young KBR employee in IRAQ in the Fifth Circuit case were kept under the auspices of the strong federal preference for arbitration, the issues of negligent retention, hiring and supervision responsibility of the employer of employees who commit sexual assault battery were carved out of the Federal Arbitration Act strong arbitration preference. Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009.

Before the Fourth Circuit decided the appeal of *Mark Baker v Booz Allen, Inc.,* the U.S. Congress passed a law providing that among other issues, specific litigation rights for negligent retention, supervision and hiring for sexual assault could not be denied in the employment contract. U.S. Public Law [PL] 111-118 Department of Defense Appropriations Act for 2010, 123 Stat. 3409, 3455, making appropriations for fiscal year ending September 30, 2010. The clear trend is official recognition that sexual assault is sufficiently common in harsh, high stress, difficult foreign work areas that the U.S. Congress officially recognized it as a problem and thus it is not a highly unusual extraordinary occurrence that breaks the chain of proximate cause. Therefore to hold in the Baker Case that sexual battery cannot be pursued by a victim in the case of US citizens in far distant

countries who are harmed by other US citizen employees of US companies is in total opposition to the US Law passed and would frustrate the purpose of its enactment. As a consequence, the Fourth Circuit Court erred in deciding as a matter of public policy that to hold the employer in such circumstances liable would tear asunder the fabric of proximate cause.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition because the U.S. 4th Circuit decision is in opposition to Federal law favoring the right to sue a Federal Contractor employer for negligent retention of employees who committed sexual assault.

Federal legislation renders inappropriate the Fourth Circuit's public policy decision that sexual assault abroad by employees in harsh foreign environments working for Washington DC headquartered Federal Contractors is so unusual and extraordinary as to break the chain of proximate cause for employer liability for negligent retention, supervision and hiring. The Federal legislation clearly shows that sexual assault caused by employer negligent retention, supervision and hiring is common enough to merit specific legislation. An amendment to the Department of Defense Appropriations Act, known as the Franken Amendment Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009), infra STATUTES SECTION 8116(a)(1) and (2) precludes Federal contractors that accept 2010 Defense Appropriation funds over $1,000,000 from entering or taking any action to enforce any provision of an existing or prospective:

"agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention". Dep't of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326, Section 8116(a)(1) and (2) (2009), infra at STATUTES.

In Pub L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009), the U.S. Congress Senate Military Appropriations Bill carved out an exception to the usual Federal preference to uphold contracts to arbitrate for the benefit of the right to sue an employer for negligent retention, supervision and hiring in the sexual battery by its employee, It came to be in response to the U.S. Fifth Circuit Court Case which while holding an arbitration clause binding for an employee against an employer whose employees committed sexual battery in a far distant, stressful and harsh work environment on U.S. business carved out a right to litigate the employer's negligent retention, supervisions and hiring for its employees sexual battery.

This Court reviews judgments in light of the "law as it now stands, not as it stood when the judgment below was entered", Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 414 (1972) (finding appeal moot because state legislature, during pendency of appeal, repealed the statute petitioner contended was unconstitutional.)

The Franken Amendment shows Federal policy that employer negligent retention, supervision and hiring liability for employee sexual assault in harsh foreign workplaces is a sufficiently common problem that it must be specifically provided for in U.S. legislation. Thus, it is not the uncommon occurrence from which public policy demands the Fourth Circuit protect Federal Contractors headquartered in Washington DC.

A. The Fourth Circuit Court used a Maryland smoke detector case as authority to deem sexual assault so extraordinary and unforeseeable that it broke the thread of proximate cause as a matter of public policy.

The U.S. Fourth Circuit held in the case sub judice that to hold a U.S. Headquartered company responsible for the sexual battery of its employee on his supervisor's eleven year old son even though his on-site supervisor in Kyrgyzstan had warned US Headquarters of the battery the employee had already committed and his worsening emotional state would tear asunder the foundation of proximate cause because sexual battery was so unusual. The Court cited as authority for its finding a case involving a smoke detector located in a house that had been resold several times which neither the Court nor the Parties discussed in oral argument and which came out after briefing was finished. We believe the Fourth Circuit Court erred in its decision.

The Fourth Circuit opinion cited a Maryland products liability case for a smoke detector failure in a house that had transferred ownership a number of times decided after briefing and oral argument and

not discussed in either to make a policy decision that sexual battery. The Court used the Pittway case as authority for its public policy decision that sexual assault was so extraordinary and unforeseeable that even though the employee had committed battery that his on-site supervisor in Kyrgyzstan had reported to Virginia HQ, it would tear asunder the foundations of proximate cause to hold the Virginia HQ Federal Contractors responsible for their employee's sexual battery against his supervisor's 11 year old son. This U.S. 4th Circuit Court made public policy decision frustrates the intent of Federal Law that specifically preserves Federal Contractor liability for negligent retention, supervision, and hiring of employees that cause injury to others in far distant, harsh environments outside the U.S.

B. **Federal Contractors are paid to manage projects in sensitive harsh environments far from U.S. headquarters and they should be working closely with their on-site supervisors and security officers. If they do not heed their on-site supervisor's warnings of a dangerous employee and there is a disaster, they should not be able to abnegate responsibility.**

Large Federal Contractors are paid to manage projects in sensitive harsh environments far from home. If they refuse to heed warnings by their on-site Chief of Party supervisors in charge of security to remove an employee identified as unfit, dangerous and capable of inflicting severe injury, then they should not get a free pass when the compromised personnel does severely injure someone the Federal Contractor knows could be in his path.

US Headquarters that refuse to heed warnings from their on-site supervisor and security officer to remove an employee the supervisor has identified as unfit, dangerous and capable of inflicting severe injury should not get a free pass when the unfit employee sexually assaults a dependent child the Federal Contractor knows would be in his path.

C. **The harsh working environment in Kyrgyzstan, 70 miles north of Afghanistan, made the US expatriate community a small cloistered group giving easy access to project members and the dependent child there under the Federal Contractor's auspices and Visa responsibility. JA 323-326, see specifically JA 325 Visa.**

The harsh environment in Kyrgyzstan, 70 miles north of Afghanistan, makes the US ex patriot community a small cloistered group who have ready access to both other members of the project and their dependent children there under the Federal Contractor's representation of responsibility to VISA authorities. In this case the dependent was the Chief of Party's 11 year old solely there under the auspices of BAH, the Federal Contractor. He was housed in apartments paid for by BAH in Kazakhstan with his mother, Chief of Party, and with the Team Leader for the Kyrgyz Part of the Project. He was schooled at BAH expense in the Kazak and Kyrgyz venues of the International Schools to facilitate his staying with his mother and the BAH team leader in Bishkek. He was transported in the company car and invited to the Project's social events. He was raped in the apartment paid for by BAH for the dangerous employee. That employee did the Project Financial

Management and was responsible for communicating with BAH's financial management department during business hours in its Virginia headquarters. Petitioner would have much less discretion in how he could escape a dangerous employee kept on the project after his supervisor identified him a capable of greatly harming him.

D. **Many large companies sustain themselves as Federal Contractors managing the execution of U.S. foreign policy and wars similar to Booz Allen Hamilton. Currently many U.S. citizens work for these large Federal Contractors because jobs in the U.S. are hard to get and hard to keep. To shield the large Federal Contractor in US Headquarters from responsibility for ignoring danger warnings from supervisors in the field that come true promotes inefficiency and waste of government money.**

The on-site supervisor and security officer is the most effective way for Federal Contractor U.S. HQ to keep informed about the dangers on location in far flung foreign U.S. project sites. To excuse large Federal Contractors in US HQ from responsibility for failure to heed the on-site supervisor's information of danger is to release the Federal Contractor from performing the primary function of management for which it is paid by the U.S. government. To excuse the large Federal Contractor in Virginia from responsibility for failure to heed the information of danger from the Chief of Party supervisor and security officer who is on-site and necessarily the most informed of the danger is to release the Federal Contractor from performing the

primary function of management for which it is paid by the U.S. government.[3]

II. **The Court should grant the petition to resolve a conflict between this decision of the U.S. 4th Circuit Court and conflicting decisions from other U.S. Circuit Courts over whether sexual assault is so extraordinary and unforeseeable that victims cannot seek relief from warned employers of employees who sexually assault.**

A. **The 4th Circuit Court Baker v BAH decision conflicts with the 5th Circuit Jones decision that preserves a sexual assault victim's right to sue a company for negligent retention, supervision and hiring even above the Federal preference for arbitration over litigation, Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009.**

The U.S. 5th Circuit decision considers sexual assault sufficiently foreseeable and unextraordinary to support the victim of sexual assault's right to sue a company for negligent retention and supervision by its employee that is greater than the Federal proclivity for favoring arbitration over litigation, Id.

The District Court in the Jones case found that claims of assault and battery; intentional infliction of emotional distress (related to the assault); negligent hiring, supervision and retention of the employees who committed the rape; and false imprisonment

[3] Although the Baker v. BAH, 358 Fed. Appx. 476, 2009, WL 5125672 C.A.4 (Md) case is not officially published by the Fourth Circuit, it is in reporters such as the Westlaw WL series with Fed Appx and WL cites. In view of Fed. R. App P 32.1, Infra, as a post 2007 case it can be cited with varying weight or no weight in the different U.S. Circuit Courts.

were not within the scope of the arbitration clause, noting that Ms. Jones could maintain them "without reference to her own employment;" while the rape might be related to the employment of the perpetrators, it was not related to the employment of the victim. Jones v. Halliburton, 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008). The Fifth Circuit spoke of Ms. Jones showing for purposes of vicarious liability of KBR, "that the alleged perpetrators were acting in ways that related to their employment because, in assaulting Jones, they were violating company policies. Id.

In Jones v. Halliburton, the District Court found that claims of assault and battery; intentional infliction of emotional distress (related to the assault); negligent hiring, supervision and retention of the employees who committed the rape; and false imprisonment were not within the scope of the arbitration clause, noting that Ms. Jones could maintain them "without reference to her own employment;" while the rape might be related to the employment of the perpetrators, it was not related to the employment of the victim. Jones v. Halliburton, 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008). Halliburton/KBR appealed. The Fifth Circuit affirmed.

B. The Fourth Circuit Court Decision conflicts with other U.S. Circuit Court decisions that allow employer liability for negligent retention when its employees sexually assault third parties, particularly vulnerable third parties likely to come into their path.

The duty that BAH breached was owed by BAH to any person and also a special duty to a young and

vulnerable 11 year old dependent of the Chief of Party who was in Kazakhstan and Kyrgyzstan under the auspices of the Federal Contractor and integrated into the Project milieu in both countries. The U.S. Fourth Circuit Court of Appeals failed to acknowledge the Federal law that clearly established that Sexual Assault by an employee under the circumstances is not extraordinary and unforeseeable and is definitely within the realm of employer litigation against Federal Contractors for negligent retention, supervision, and hiring even in preference to the Federal Arbitration Act's congressional declaration of a liberal federal policy favoring arbitration agreements. See also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) concerning arbitration.

The trend in the United States is to make parties responsible with respect to rape and murder. The plaintiff in Nazareth v. Herndon Ambulance Service, Inc., 467 So.2d 1076, 68 ALR 4th 1 (Fla. Dist. Ct. App. 5th Dist. 1985), was sexually assaulted by an ambulance attendant while being transported to the hospital. The court found an implied contract for passage free from attack, and on that basis imposed vicarious liability on the defendant ambulance company for the acts of the attendant to whom it had delegated the plaintiff's care. A similar result was reached by the Maryland Court of Appeals in St. Michelle v. Catania, 252 Md. 647, 250 A.2d 874 (1969) a case in which the plaintiff was raped by a cab driver and another passenger. Similarly, In Doe

v. Celebrity Cruises, Inc., 394 F.3d 891, 2005 A.M.C. 214 (11th Cir. 2004), the court applied maritime law to hold a cruise line strictly liable for a crew member's sexual assault of a female passenger. In one particularly egregious case from Florida, where the perpetrator, a prominent attorney and school board member, was removing a child from school during the day, taking the boy to his law office or his home and sexually assaulting him, the court allowed negligence claims against the perpetrator's wife, who had a duty to protect a "child social guest" in her home, as well as the law firms where the perpetrator had been employed, which "had a duty to exercise reasonable care to protect [plaintiff child] from foreseeable harm" in their offices. Doe v. Faerber, 446 F. Supp. 2d 1311, 213 Ed. Law Rep. 206 (M.D. Fla 2006)]; See also Holy See v. Doe, No. 09-1 (9th Cir.,) 557 F.3d 1066; CVSG Nov. 16, 2009 up on Petition for Writ of Certiorari U.S. Supreme Court which gives an idea of the level of confusion among the Circuits in this area.

III. This Court should grant the Petition to resolve the question of standard of proof of foreign law under Federal Rules of Civil Procedure Rule 44.1.

Maryland conflicts law is lex loci delicti, where the last act of the tort was committed which is Kyrgyzstan the capitol of which is Bishkek, the staging area of our troops for the war in Afghanistan. Although Defendant originally used a Declaration opinion citing 1960's Former Soviet Union law without production of that law to assert

that a case could not be brought because Plaintiff had not prevailed in a criminal charge against the employee. A40-43. Plaintiff's subsequent production of the hard to obtain Kyrgyz SSR law the Declaration cited from the 1960's showed there was nothing prohibiting Plaintiff from filing a civil case in Kyrgyzstan. A32-40. Further, the Kyrgyz law expands the ability to sue for medical bills to children harmed under the age of 15. Further, the issue of scope of employment was in the Soviet Kyrgyz law in effect in 1996 when the rape occurred a question of fact to be determined from the circumstances. Id. An employee, such as the unfit financial manager living in an apartment paid for by BAH, where he had company equipment and received communications during Virginia HQ business hours including from the financial management department in Virginia HQ is pursuing company work. The weekend Friday night in Kyrgyzstan when the rape occurred from 8 pm to Saturday morning 4 am is the Virginia HQ work day 9am to 5 pm. when he can be called on business by Virginia HQ.

The District Court decided that Maryland lex loci delicti made Kyrgyz the applicable law for ability to sue. The District Court used Respondent representations about the Declaration A40-43 which misquoted Kyrgyz law to say the case could not be brought unless Petitioner had first obtained a criminal conviction and BAH had ordered the employee to rape the 11 year old child. A25 Considering the Respondent's incorrect representation of narrow respondent superior liability the District Court deemed the case

procedurally barred in Kyrgyz Court and therefore barred in his court.

The District Court then proceeded to rule that if he was wrong and the case was not barred then Maryland law applied for which he considered the evidence insufficient to overcome summary judgment. If he was incorrect on Maryland law then Virginia law would not fair much better, although it did recognize broader negligent retention relief. A26.

The 4th Circuit Court did not deal with the actual Kyrgyz law cited infra A32-40. Instead the Circuit Court created its own public policy which it based on a case about litigation against the builder of a house for a smoke detector that failed after the house had been bought and sold a few times. From this case the Circuit Court extrapolated the public policy that negligent retention liability for rape by an employee even when the Federal Contractor in Virginia HQ has been warned by the on-site supervisor of his battery of others and explosive emotional unfitness and likelihood of gravely harming her son or others was extraordinary and unforeseeable. The Fourth Circuit Court ruled that: "BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity". A1-16. Therefore, despite the fact that the on-site supervisor in the harsh environment with the employee had warned US Virginia HQ and asked them repeatedly to remove him back to the US HQ, the Circuit Court ruled that to hold the Virginia Federal Contractor liable for negligent retention and supervision would tear asunder the foundations of proximate cause.

The Circuit Court's public policy decision would seem to be inconsistent with Maryland law. Maryland law applies lex loci delicti in a conflict of law situation where the events giving rise to a tort action occur in more than one State. Under the principle of "lex loci delicti" courts are to apply the law of the State where the injury, the last event required to constitute the tort, occurred. Under Maryland's exception to its traditional rule of "lex loci delicti", pursuant to which in tort actions courts otherwise are to apply the law of the state where the injury occurred, the law of the forum will be applied whenever the law of the place of the wrong is contrary to a strong public policy of the forum state. Erie Ins. Exchange v. Heffernan, 399 Md. 598, 925 A.2d 636, Md., 2007. June 13, 2007.

In Erie Ins. Exchange v. Heffernan, 399 Md. 598, 925 A.2d 636, Md., 2007. June 13, 2007 the Maryland Court of Appeals had before it one of the questions of law certified by the United States District Court for the District of Maryland pursuant to the Maryland Uniform Certification of Questions of Law Act (Maryland Code, §§ 12-601 through 12-613 of the Cts. & Jud. Proc. Article) which dealt with lex loci delicti. The Court of Appeals held:

> There exists a well-established exception to the traditional rule of *lex loci delicti*. 10 Under the exception, the law of the forum will be applied whenever the law of the place of the wrong is **contrary to a strong public policy of the forum state.** See Schmidt v. Driscoll Hotel, Inc., 82 N.W.2d 365 (Minn. 1957).... "that merely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to

> Maryland public policy and thus unenforceable in our courts. Rather, for another state's law to be unenforceable, there must be 'a strong public policy against enforcement in Maryland,' or 'a public policy sufficient to require the application of law other than the law of the place of the contract,'" Bethlehem Steel Corp., 304 Md. at 189, 498 A.2d at 608 (citations omitted).

Thus, even in the Fourth Circuit jurisdiction there is great divergence in how Rule 44.1 standard of proof of law is applied. With no clear standard for application countless hours of Court time will be wasted in litigation over what law is to be applied.

This case is important because the U.S. has hundreds of thousands of US citizens working and fighting abroad and it immediately impacts their avenue to justice even when they are harmed far away from home

For these reasons, the Fourth Circuit Court of Appeal erred and the case is important.

CONCLUSION

The conflict between the U.S. Fourth Circuit Court of Appeals and the Federal law as to whether sexual assault by an employee is so extraordinary and unforeseeable that it breaks the chain of proximate cause for employer negligent retention, supervision and hiring litigation frustrates the intent of Federal law.

The conflict between the U.S. Fourth Circuit Court of Appeals and the Federal law as to whether

sexual assault by a seriously emotionally compromised employee of a Federal Contractor receiving payment for management of execution of U.S. policy and receiving notice from the local supervisor abroad of eminent danger of grave physical injury threatens an important aspect of administration and cost containment execution of U.S. foreign policy execution and military objectives. Large Federal Contractors at their U.S. Headquarters can ignore warnings from the on-site supervisors, Chief of Party and security officer of eminent danger of grave physical injury from compromised employees who have become unfit in harsh working circumstances and abnegate responsibility even when grave physical injury occurs in the form of rape sexual battery of innocent victims. In this case the innocent victim was the eleven year old dependent son of the Chief of Party who was part of the Booz Allen Hamilton party [under the BAH Visa Kazakhstan and Kyrgyzstan near Afghanistan] for the U.S. AID Bankruptcy Project.

This Court should grant the Petition and resolve the conflict between the U.S. Fourth Circuit Court of Appeals and Federal law, and conflict between Circuit Courts to provide uniformity in the treatment of warned of grave physical danger from employees which result in sexual assault and the responsibility of the U.S. Headquarters noticed by the employee's on-site supervisor, head of project and security officer in far distant harsh environment

countries executing U.S. foreign policy and military operations.

Respectfully submitted,

/s/ Kathleen Woody
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Dated: June 24, 2010

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1152

MARK BAKER,
Plaintiff - Appellant,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellee.

No. 08-2321

MARK BAKER,
Plaintiff - Appellee,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellant.

Appeals from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (8:06-cv-00889-RWT)

Argued: October 28, 2009
Entered: December 28, 2009

Before MICHAEL, Circuit Judge, HAMILTON, Senior Circuit Judge, and Jane R. ROTH, Senior

Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Kathleen Joanna Woody, Silver Spring, Maryland, for Appellant/Cross-Appellee. Stephen William Robinson, MCGUIREWOODS, LLP, McLean, Virginia, for Appellee/Cross-Appellant. ON BRIEF: David L. Greenspan, MCGUIREWOODS, LLP, McLean, Virginia, for Appellee/Cross-Appellant.

Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

Mark Baker (Baker) brought this diversity action against Booz Allen Hamilton, Inc. (BAH), alleging several negligence claims arising from the alleged sexual assault of Baker by a BAH employee. The district court granted summary judgment in favor of BAH. Following this ruling, BAH moved for sanctions, which the district court denied. Baker appeals the district court's summary judgment ruling, and BAH cross-appeals the district court's sanctions ruling. We affirm.

I

BAH is a management consulting firm with over 19,000 employees on six continents. In 1995, BAH commenced work for the United States Agency for International Development as a contractor on its project for the development and implementation of an effective bankruptcy system in Kazakhstan and Kyrgyzstan (the Bankruptcy Project).

On or about October 1, 1995, BAH entered into a one-year contract with Baker's mother, Kathleen Woody (Woody), in which Woody agreed to provide consulting services as an independent contractor, serving as "Chief of Party" to the Bankruptcy Project. (J.A. 70).[1] As Chief of Party, Woody was responsible for supporting the development of legislation to allow bankruptcy laws to function in Kazakhstan and Kyrgyzstan. She was also responsible for supervising expatriate staff and reporting to her supervisors, who were located at BAH's offices in McLean, Virginia.

In October 1995, Woody traveled with her then-ten-year-old son to Almaty, Kazakhstan to begin working on the Bankruptcy Project. Woody's primary work station was in Almaty, where she resided with her son in an apartment, but she also made frequent trips to the Bankruptcy Project's Bishkek, Kyrgyzstan office. During these trips to Bishkek, Woody would bring her son, and the two would reside at the apartment of Vera Haugh, who worked for the Bankruptcy Project in Bishkek. On occasion, Woody's responsibilities took her away from both Kazakhstan and Kyrgyzstan, and on these occasions, Baker would stay with Haugh.

In Bishkek, Woody also had contact with another Bishkek-based BAH employee working on the Bankruptcy Project, Brian Davenport (Davenport). Davenport's primary job duties were to "deal with the non-legal, non-lawyer required aspects of performance and scope work under the [Bankruptcy

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[1] Woody's compensation package covered certain expenses for her son during his year-long stay in Kazakhstan, including his airfare to and from Kazakhstan and his school tuition.

Project's] task order." (J.A. 81). Davenport reported to Woody for "scope of work issues related to the task order itself," but generally reported to a Virginia-based BAH employee. Id.

Baker produced evidence that portrays Davenport as an angry, disgruntled, and sometimes explosive employee. For example, Dr. Igor Klyuchnikov, Deputy Chief of Party on the Bankruptcy Project, described Davenport as an "angry and sometimes physically and emotionally abusive person." (J.A. 474). He personally observed Davenport "yelling at and threatening staff, kicking furniture and throwing objects." Id. Some of the Kyrgyz nationals complained to Dr. Klyuchnikov, and he received one complaint that Davenport slapped an employee.[2]

Woody testified that, between the months of January and March 1996, she had repeated discussions with her BAH supervisors concerning Davenport's "explosive" behavior, complaining in general about Davenport's "[s]lapping, throwing, shouting, screaming, [and] yelling." (J.A. 257, 268).[3] She indicated the major catalysts for Davenport's behavior were his wife's desire to divorce him and his desire to return to work in the United States.

Davenport also on occasion got angry with Baker. For example, on a three-hour car ride from Almaty

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[2] Baker also personally observed Davenport slap an employee across the face.

[3] Haugh testified that Davenport had a "bad temper," but was not the type of person who would assault someone. (J.A. 383). Rather, "he's the type that would throw things off his desk, yell and scream, maybe stamp his feet . . . and slam doors." Id.

to Bishkek in December 1995, Baker was playing a game with the hired driver and perhaps acting a little rambunctiously. At one point, Davenport (who was sitting in the front seat with the driver) turned to Baker (who was sitting next to Woody in the backseat), pointed his finger at him, and said, raising his voice, "if I don't get my REM [(Rapid Eye Movement)] sleep I'm going to explode." (J.A. 323). Moreover, at a New Year's Eve party, about three months before the alleged sexual assault, in a threatening tone, Davenport told Baker he was going to "get" him. (J.A. 287).

On April 6, 2006, Baker brought this negligence action against BAH in the Circuit Court for Montgomery County, Maryland.[4] BAH removed the case to the United States District Court for the District of Maryland. On March 9, 2007, Baker filed an amended complaint. The amended complaint alleges that

> [i]n or about March of 1996, while performing her duties as hereinabove described in the country of Kyrgyzstan, the Plaintiff, then a minor, who was residing with his mother overseas, was raped and sodomized and threatened not to tell his mother by an employee of BOOZ ALLEN who was known or in the exercise of reasonable care should have been known to BOOZ ALLEN as a person with serious emotional disorders who had previously requested of BOOZ ALLEN that he be returned to the United States as a result of said emotional disorders.

[4] Because of Baker's age, the statute of limitations was tolled under Maryland law.

(J.A. 32-33). Although not named in the amended complaint, Davenport is the BAH employee who allegedly sexually assaulted Baker. Davenport vehemently denies the allegations, but BAH concedes for purposes of summary judgment we must assume that Davenport engaged in such conduct. According to Baker, the alleged sexual assault occurred while he was staying with Haugh at a time when Woody was away on business in Moscow. During this time, Davenport lured Baker to his own apartment in Bishkek and sexually assaulted him.[5]

Based on the allegations in the amended complaint, Baker claimed that BAH was negligent because it: (1) "[f]ailed to adequately consider the reports" that Davenport was suffering from emotional disorders which were likely to result in a sexual assault; (2) "[f]ailed to foresee" that Davenport's actions against Baker would be carried out; (3) "[f]ailed to warn" or provide notice to Woody of Davenport's emotional disorders; and (4) "[f]ailed to provide" Baker with adequate security. (J.A. 33).

On July 30, 2007, BAH filed a motion for summary judgment. On December 19, 2007, the district court held a hearing on the motion. At the conclusion of the hearing, the district court granted the motion. On January 16, 2008, BAH filed a motion for sanctions, which the district court denied on October 31, 2008. Baker filed a timely notice of

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[5] Baker did not report the sexual assault to his mother. Rather, he disclosed the sexual assault to his therapist some time in early 1997. According to Baker, he did not disclose the sexual assault to Woody because, at the time, he "didn't trust anybody." (J.A. 207).

appeal, and BAH filed a timely notice of cross-appeal.

II

Baker claims that the district court erred when it granted summary judgment in favor of BAH on his negligence claims. More specifically, he claims there are issues of fact regarding BAH's liability for the negligent hiring, retention, and supervision of Davenport.

In a diversity action, the law of the forum court governs the substantive issues and federal law governs the procedural issues. Dixon v. Edwards, 290 F.3d 699, 710 (4th Cir. 2002). Thus, Maryland's choice of law rules govern. Id.; Wells v. Liddy, 186 F.3d 505, 521 (4th Cir. 1999). Maryland applies the lex loci delicti rule in tort cases. Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 230 (Md. 2000). Under that rule, when a tort occurs in another state, the substantive rights of the, 785 F.2d 503, 511 (4th Cir. 1986) (applying Maryland law). parties, even though they are domiciled in Maryland, are to be determined by the law of the state in which the alleged tort took place. Id. A tort occurs "where the injury was suffered, not where the wrongful act took place." Johnson v. Oroweat Foods Co.

Baker's alleged injuries were suffered in Kyrgyzstan, the site of the sexual assault. Thus, Kyrgyz law applies, provided the requirements of Rule 44.1 of the Federal Rules of Civil Procedure are met. See Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 216 (3d Cir. 2006) (noting that where a party fails to carry its burden of proving foreign law under Rule 44.1, the forum law should apply); cf. The Hoxie, 297 F. 189, 190 (4th Cir. 1924) (noting, in

pre-Rule 44.1 case, that forum law applies unless the party seeking to use foreign law establishes that foreign law differs from forum law).

Federal Rule of Civil Procedure 44.1 controls determinations of foreign law in federal court. It provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. Rule 44.1 provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no duty upon them to do so. See Carey v. Bahama Cruise Lines, 864 F.2d 201, 205 (1st Cir. 1988) ("[Rule] 44.1 empowers a federal court to determine foreign law on its own, but does not oblige it do so."). Thus, the party claiming foreign law applies carries both the burden of raising the issue that foreign law may apply in an action and the burden of proving foreign law to enable the district court to apply it in a particular case. Cf. Whirlpool Fin. Corp. v. Sevaux, 96 F.3d 216, 221 (7th Cir. 1996) (holding that party waived conflicts of law issue because it failed to fulfill its obligation under Rule 44.1 "to provide the district court with 'reasonable notice' of his intention to raise an issue of foreign law"). Where a party fails to satisfy either burden, the district court should

apply the forum state's law. Ferrostaal, 447 F.3d at 216.

In order to meet its burden of proving Kyrgyz law, BAH proffered the July 25, 2007 declaration of a Kyrgyz lawyer, Tatiana Ivaschenko. In her declaration, Ivaschenko stated that Baker's claims were without merit under Kyrgyz law, opining:

> [A] legal entity shall be responsible for its employee's actions or inactions, if that employee has caused harm to third parties in the course of the performance of his or her employment obligations. . . .
>
> Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions unless the predicate act[s], which must have resulted in criminal sanctions, [were] completed upon the employer's order and control. . . .
>
> In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure . . . .
>
> * * *
>
> In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages ca[u]sed by its employee to a third party only in the course of performance by such employee of his/her employment obligations or official duties. An employer cannot be held

> responsible for a criminal act (i.e., buggery) committed by the employee, unless the act is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint.

(J.A. 409-10).

In its decision granting BAH's motion for summary judgment, the district court, out of an abundance of caution, held that Baker could not prevail under Kyrgyz (the locus of Baker's injuries), Maryland (the forum state), or Virginia law (where decisions concerning Davenport's employment were made). Baker claims that Maryland law should apply because BAH failed to meet its burden of proving Kyrgyz law and, therefore, Maryland law, as the forum state's law, applies. In particular, he claims that the statutes referenced in the Ivaschenko declaration are not controlling and, in any event, do not fully explain the breadth of Kyrgyz law.

We need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail.

The district court rejected Baker's negligence claims under Maryland law, principally concluding that Baker failed to establish that any negligent conduct by BAH proximately caused Baker's injuries. In so concluding, the district court observed:

> I've received no information in this record that would support a conclusion that Booz Allen

> was on notice that this employee had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks. All I do have is some incidents of obnoxious behavior--two instances of slapping someone, and bitter complaints by the plaintiff's mother to her employer that this man should be sent home.

(J.A. 543).

Under Maryland law, a plaintiff alleging a negligence claim must demonstrate "(1) that the defendant had a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the defendant's breach of duty proximately caused the loss or injury." Pendleton v. State, 921 A.2d 196, 204 (Md. 2007).

In the negligent hiring, retention, and supervision context, an employer has the duty to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee. Henley v. Prince George's County, 503 A.2d 1333, 1341 (Md. 1986). The class of persons intended to be protected by the imposition of this duty necessarily includes those members of the public who would reasonably be expected to come in contact with the employee in his performance of his duties. Id.

Proximate cause "involves a conclusion that someone will be held legally responsible for the consequences of an act or omission." Peterson v. Underwood, 264 A.2d 851, 855 (Md. 1970). To be a proximate cause for an injury, "the negligence must be 1) a cause in fact, and 2) a legally cognizable

cause." Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 642 A.2d 219, 230 (Md. 1994) (citation and internal quotation marks omitted).

Causation-in-fact concerns the threshold inquiry of "whether defendant's conduct actually produced an injury." Peterson, 264 A.2d at 855. When two or more independent acts bring about an injury, as alleged here by Baker, causation-in-fact may be found if it is more likely than not that the defendant's conduct was a substantial factor in producing the plaintiff's injuries. Pittway Corp. v. Collins, 973 A.2d 771, 787 (Md. 2009).

Once causation-in-fact is established, the proximate cause inquiry turns to whether the defendant's negligent actions constitute a legally cognizable cause of the plaintiff's injuries. Id. This part of the causation analysis requires us to consider whether the actual harm to the plaintiff falls within a general field of danger that the defendant should have anticipated or expected. Stone v. Chicago Title Ins. of Md., 624 A.2d 496, 500 (Md. 1993). Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established. Pittway, 973 A.2d at 787. The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. Id. at 788. Other public policy considerations that may play a role in determining legal causation include the remoteness of the plaintiff's injury from the defendant's negligence and the extent to which the injury is out of proportion to the defendant's culpability. Id. Simply put, the defendant is not liable if it appears highly extraordinary and unforeseeable that the plaintiff's

injuries occurred as a result of the defendant's alleged tortious conduct. Id.

In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport. The injury suffered by Baker was criminal sexual assault. Baker argues that this sexual assault was a foreseeable result of Davenport's "explosive" behavior in the workplace. We disagree. Without question, Davenport's demeanor at work was offensive. Slapping fellow employees is deplorable. However, BAH reasonably can assume that an employee who has slapped fellow employees on occasion will not sexually assault the child of an independent contractor of BAH. Therefore, BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim. Slapping a fellow employee simply does not inexorably lead to criminal sexual assault.

It does not follow that every time an employee slaps another employee the employer has to fire the aggressor out of fear that the employee might rape another employee or person. But this is exactly what Baker is seeking this court to hold. Such a holding would undoubtedly tear the concept of proximate cause from its moorings. Accordingly, the district court did not err when it concluded that Baker's negligence claims failed under Maryland law.

III

BAH appeals the district court's denial of its motion for sanctions. BAH sought sanctions under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. BAH claims that sanctions were appropriate because: (1) Baker did not conduct an adequate pre-filing investigation; and (2) Baker refused to abandon his negligence claims after it was clear he had no chance of success. We review the district court's grant or denial of a motion for sanctions for an abuse of discretion. Chaudhry v. Gallerizzo, 174 F.3d 394, 410 (4th Cir. 1999).

Under Rule 11, "a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to [Rule 11] sanctions." In re Kunstler, 914 F.2d 505, 516 (4th Cir. 1990). Moreover, Rule 11 empowers the district court to sanction a party or lawyer for insisting on a position after it is no longer tenable. Morris v. Wachovia Securities, Inc., 448 F.3d 268, 279 (4th Cir. 2006).

Section 1927 provides in relevant part:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The Supreme Court has recognized that § 1927 "does not distinguish between winners and losers, or between plaintiffs and defendants." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762

(1980). Moreover, "[t]he statute is indifferent to the equities of a dispute and to the values advanced by the substantive law." Id. Instead, the statute is "concerned only with limiting the abuse of court processes." Id. For this reason, a court considering the propriety of a § 1927 award must focus "on the conduct of the litigation and not on its merits." DeBauche v. Trani, 191 F.3d 499, 511 (4th Cir. 1999).

BAH claims that Baker falsely alleged in his complaint that: (1) Davenport had serious emotional disorders; (2) Davenport had previously requested that he be returned to the United States as a result of the disorders; (3) BAH failed to consider reports of Davenport's disorders; and (4) the sexual assault was caused by Davenport's disorders. BAH also claims that the frivolous nature of Baker's claims became all the more apparent following Baker's deposition. Finally, BAH takes issue with the manner in which Woody handled certain aspects of the case.

In this case, the district court did not abuse its discretion in denying BAH's motion for sanctions. Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. Finally, we have reviewed Woody's conduct and conclude that the district court acted well within its discretion when it decided to

decline to sanction her either under Rule 11 or § 1927.

IV

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK BAKER,
Plaintiff

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant

Case number: RWT 06cv889

Entered December 19. 2007

ORDER

Upon consideration of Defendant's Motion for Summary Judgment [Paper No. 56], Defendant's Motion to Strike the Affidavits of Leo Surla, Irina Zipman, and Igor K. Klyuchnikov [Paper No. 79], the oppositions and replies thereto, and the arguments of counsel presented at the hearing conducted before the undersigned today, for the reasons stated on the record, it is this 19th day of December, 2007, by the United States District Court for the District of Maryland,

ORDERED, that Defendant's Motion to Strike the Affidavits of Leo Surla, Irina Zipman, and Igor K. Klyuchnikov [Paper No. 79] is GRANTED IN PART and DENIED IN PART; and it is further

ORDERED, that Defendant's Motion for Summary Judgment [Paper No. 56] is

GRANTED; and it is further

ORDERED, that judgment for costs be entered in favor of Defendant; and it is further

ORDERED, that the Clerk of the Court **CLOSE THE CASE**..

/s/

ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

Entered: January 25, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1152(L)
(8:06-cv-00889-RWT)

MARK BAKER,
Plaintiff - Appellant,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellee.

No. 08-2321
(8:06-CV-00889-RWT)

MARK BAKER,
Plaintiff - Appellee,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellant.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Senior Judge Hamilton and Senior Judge Roth.

For the Court
/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT COURT
OF MARYLAND,

Mark Baker,
Plaintiff,

v.

Booz Allen Hamilton, Inc.,
Defendant,

Civil Action: RWT-06-0889.

Wednesday, December 19, 2007,
Greenbelt, Maryland.
Excerpts of Transcript of Motions Hearing
Before the Honorable Roger W. Titus

JA 110

MR ROBINSON: The first issue the court, I believe, has to look at is the choice of law. We have provided an affidavit from a lawyer in Kyrgyzstan that indicates that there are clearly a number of procedures and steps that have to be followed under Kyrgyz law in order for this claim to be cognizable.

THE COURT: Let me ask you one thing, and perhaps it's a question of omission, or maybe it's otherwise. I've reviewed the affidavit of the lawyer, and it's a civil law state or country, and everything is going to be written in these codes. There was no addressing in that affidavit any basis for liability under a theory of negligent hiring or supervision, only that one would have respondeat superior-type

liability under certain circumstances that were limited by that opinion.

Is the absence of any discussion of that an oversight? Or is there simply no basis under Kyrgyzstan law for imputing liability to an employer for negligent hiring or supervision?

MR. ROBINSON: It's the latter, Your Honor. To the extent that there is any potential liability, as I appreciate Kyrgyz law, it is solely under the respondeat superior theory that was contained in the affidavit.

THE COURT: If you don't have respondeat superior circumstances, you don't have liability under

MR. ROBINSON: That's correct, Your Honor. Yes, sir. See JA 110-111.

JA 118

MR. WOODY: In relation to the duty that was owed to Mark. A special relationship did occur between Mark Baker and Booz Allen, because under the contract that his mother, Ms. Woody, had with Booz Allen, Booz Allen was to pay for the housing, the education, the nanny, the transportation, and medical costs of the child and also of the adult. Mark was in Kazakhstan on a special visa of Booz Allen, not on his own visa. He was there on his own special visa from Booz Allen which Booz Allen had the right to withdraw at any time, again indicating a special relationship. He would not have been allowed in the country except for that special visa that he has.

All of these matters were a matter of contract between Ms. Woody and Booz Allen, creating a special relationship. Booz Allen was well aware that

Mark would be around Davenport during this entire task period. He was at the office with his mother, he was—they traveled together. The attended functions together, and all of them were part of a small Booz Allen family in Kyrgyzstan and Kazakhstan. It was well understood that these parties would all be thrown together.

Incidentally, Booz Allen also paid for the residence of Davenport. Because there was an 11-hour difference between the Virginia time and Kazakhstan time, both Ms. Woody and Mr. Davenport had to be available in the evenings, and Booz Allen paid for those residences of each, Ms. Woody and Mr. Davenport. As a matter of fact, Mr. Davenport, at one time, made a comment during his deposition how one time he was awakened in his sleep in the middle of the night at 3 o'clock in the morning he bumped his head because Virginia had called him at that time, and they called often at that time, as Ms. Woody had to call often at this time. JA 118-120.

MR WOODY: First of all, we would like to point out the type of relationship that Ms. Woody had with Mr. Davenport. It was that of a superior and a subordinate. Okay? There is another aspect of this thing, too. It involves a chain of command, Your Honor. There was a chain of command where Kate was the chief of the party in Kazakhstan, a remote and very dangerous country, and he was a subordinate. She was the captain for all intents and purposes – the colonel. The generals were in Virginia, okay? It was the responsibility of the captain of that project to advise Booz Allen, her superiors, of the difficulty that she was having with an employee, and these are not slight difficulties.

These are difficulties that involve violence, temper, and throwing items. He had a disposition towards that that she warned them about constantly.

Now in the case of Segerman, it points out that if you have a general disposition that an activity that a person took, even though it was not, as you said, described of a sexual nature, it provided a—it described a violent type of action, and who other than Kate, the captain that was on site at the time and was in a position to advise Booz Allen that there were any difficulties with her under-employee.

As a matter of fact, it was admitted at one of the depositions that Norman Kirsch, that, oh, we just took that as office gossip. I'm sorry, Your Honor but it's not office gossip when your field captain tells the colonel at the home office that this person has a propensity towards anger violence, and is becoming and is acting unstable and wants to go home and has difficulties with his divorce and basically she feels uncomfortable, and she feels that not only herself but others are in danger.

As far as the foreseeability is concerned that he would commit this exact. I think it's clear that in Segerman it says that you don't have to have anticipated the foreseeable and exact act, just the general field. The general field of violence, of temper, of insubordination, of unhappiness. These were the types of things that she was reporting and she should have been reporting to Booz Allen at the home office, and there were required, and they needed to give great weight to this which they apparently gave none.

THE COURT: In this case, there is no dispute that any injury that allegedly was suffered by the plaintiff was in Kyrgyzstan. Therefore, applying the choice of law rules of the state of Maryland, I should look to the laws of Kyrgyzstan, at least initially, and ascertain the law of that jurisdiction to the extent that I can. JA164

******

[Through the Defendant] I've had an affidavit offered to me from an attorney named Tatiana Ivashchenko.... She Indicates that a legal entity is responsible for its employee's actions or inactions if that employee has caused harm to third parties in the course of the performance of his or her employment obligations but notes that even if an employee were to cause harm to a third party in the course of the performance by that employee of his or her employment obligations, and employer shall not be liable for its employee's actions or Inactions, unless the predicate act, [rape], which must have resulted in criminal sanctions, were completed on the employer's order and control. JA 165

******

I have been advised by counsel at argument today that the Kyrgyzstan was asked to advise about the law of employer hability for torts that harm third persons and that this was the answer given and that there was no explication of an alternative basis of hability such as is recognized in some jurisdictions for negligent hiring, supervision or retention. It would appear that the Kyrgyzstan law has a relatively narrow scope of employer liability for actions such as the nature alleged in this case. I have no reason to dispute that, and it seems to me

that the law of Kyrgyzstan would not permit liability to be imposed upon Booz Allen under the circumstances of this case.....JA 165-6

I will not, however, rest any decision on such a simply relying solely upon Kyrgyzstan law, and I will address the question of whether or not there is a possible basis for liability under either Maryland law or under Virginia law...JA166

******

Therefore, I conclude that if I were to apply Maryland law, which I conclude I do not need to apply but alternatively will apply to the extent that my analysis of the Kyrgyzstan law issue Is incorrect, I conclude that the plaintiff has failed to meet his burden of show that the defendant knew or should have known that the defendant was potentially dangerous. "Dangerous" meaning a danger of committing a sexual or other violent assault." JA172

Finally, to the extent that my analysis of Kyrgyzstan and Maryland law is incorrect, in Virginia, the plaintiff does not fair any better. JA 172-3

Virginia does recognize a separate claim for negligent retention in which an employer may be liable where it knew or should have known the employee was dangerous and likely to harm others.....JA173.

******

Therefore, I will enter an order for the reasons that I have just stated on the record which grants the defendant's motion for summary judgment... JA 175

Excerpt from Davenport Self-Assessment for BAH February 25, 1996 JA 492-3

3. Describe your...disappointments:

Inability of firm to field sufficient number of individuals in related areas of expertise on tasks, leading to the reliance on under qualified and inexperienced special consultants and subcontractors, unwillingness of firm to support employees with appropriate experience in contentious technical, contractual, and budgetary discussions with the above individuals.

5. Degree of Progress Against Law Year's Development Needs: Some

Evidence: One of the major goals of the past year was to gain more knowledge about the inner-workings of the firm and of consulting practices in general. This has not occurred as our practice has been forced to push people out into the field to keep billability high. This tactic has the down-side of often sacrificing individual career development.

7. Feelings About Your Job: What are your frustrations and motivations?

My main frustration at this point is that, rather than feeling like a "valuable employee," I rather feel like a "pin point" on a large map. A "pin point" that can be occasionally pointed to from time to time, and then moved with little regard. Otherwise, it just sits there and is ignored...

Excerpt from Davenport Self-Assessment for BAH March 3, 1995 JA 486-8

Accomplishments: Successful management of AED training program despite logistical and administrative complication; ability to assume field assignment on short notice and then remain longer than anticipated due to changing circumstances, successful transition from academic to professional consulting environment.

Disappointments: Lack of direction on certain corporate procedures and administrative requirements from colleagues; inability of firm to field sufficient number of individuals in related areas of expertise on tasks mitigating against interaction with and reliance upon uncooperative subcontractors.

4. Goals: My goal for the next year is to complete at least one longer term field assignment and then return to the Program Office [in Virginia] to craft or manage a task of my own design, preferably in Russia and in the area of Defense Conversion or Military Assistance.

5. Degree of Progress Against Last Year's Development Needs Substantial. I feel that few individuals sharing the academic background that I have are able to make the transition to the more immediate "task oriented" environment that characterizes the consulting world.

6. Career Development Strategy: for the next year

Priority 1: Firm Knowledge

Attend Booz Allen's Business Processes Date Expected-Upon Return Stateside

Priority 2: Teamwork

Attend Interpersonal and Team Effectiveness Date Expected – Upon Return Stateside.

Priority 3: Technical Knowledge

Work with PCS on financial aspects of follow Kazak/Kyrgyz follow on tasks Current to June 2005

Priority 4: Client Relations

Interface with local [US] AID mission as much as possible and interact with AID-Washington based staff when in the field. Date Expected Current to June 2005.

7. Feelings About Your Job: I am motivated by the fact that in this program, we are actually "doing something" active in the Soviet Union....What I am frustrated by, however, are the complicated caused by the nature of the work-being "flexible" to changes and delays and then being ready to go in an instant to a long-term overseas assignment can be a logistical nightmare. We are beginning to address these issues in some of the procedures that we are instituting, but I believe that we need some sort of "safety net, to address the personal difficulties that arise from our professional work. These feelings remain once deployed into the field, although it is evident that our Program off is learning although somewhat too slowly to suite some tastes, to institute standard policies to mitigate both against

the above, as well as through difficulties encountered once deployed.

PERFORMANCE APPRAISAL BY NORM KIRSCH in McClean Virginia JA 451-455

EVIDENCE/COMMENTS/DEVELOPMENT NEEDS:

[Brian] has demonstrated his ability to ...accomplish...work plan activities in a challenging and harsh overseas environment. JA 454

PERFORMANCE APPRAISAL BY NORM KIRSCH in March 1996 McLean VA, JA 496-500.

Development Needs:

...Brian needs to further develop his interpersonal and group-support and coordination activities...

Summary Comments:

Brian's energetic drive to solve problems and **maintain control** are commendable but he needs to gain a better understanding of superior-subordinate authority and support responsibilities....

VI. Brian...has...a poor working relationship with his Chief-of-Party supervisor on the current Bankruptcy Law Task.

VI. Brian...[functions]...in a technically complex and challenging work environment...

VII. Brian spent the majority of this rating period (10 months) o overseas assignment in the NIS [former Soviet Union] and was unable to participate in the Bah Internal training courses [Virginia] courses recommended in last year's development needs 'strategy for the coming year.' It is anticipated that Brian's return to the home office in the next

year will be sufficient in duration to allow for his attendance in these same courses.

Flexibility and Adaptability – Needs Improvement

CIVIL CODE OF THE KIRGHIZ SSR Frunze[1] 1964 LAW OF THE KIRGHIZ SOVIET SOCIALIST REPUBLIC CONCERNING RATIFICATION OF THE CIVIL CODE OF THE KIRGHIZ SOVIET SOCIALIST REPUBLIC July 30, 1964 Frunze

*****

CHAPTER 41 OBLIGATIONS ARISING AS A CONSEQUENCE OF CAUSING HARM

Article 454 General basis for liability for harm caused

Harm caused to the person or property of a citizen or harm caused to an organization shall be made good in full measure by the person causing the harm.... Translated by Paul W. Merriam, American Translator's Association Certified Translator, Russian to English August 4, 2008

Article 455 Responsibility of an organization for harm caused through the fault of its workers

An organization must compensate harm which is caused through the fault of its workers during the fulfillment by them of their work (service) responsibilities.

Article 464 Responsibility for harm caused by a source of increased danger

Organizations and citizens, whose activity cause increased danger to others are obligated to compensate harm which is caused by the source of

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[1] Frunze, is now called Bishkek. It was the capital of the Kyrgyz Soviet Socialist Republic (Kyrgyz SSR) of the Former Soviet Union (Union of Soviet Socialist Union [USSR]). It is the capital of the troubled post USSR Kyrgyz Republic 70 miles north of Afghanistan.

increased danger Article 465 Responsibility for Harm Jointly Caused by Several Persons

Persons, who have caused harm jointly bear joint and several liability for the losses (casualties).

Article 475. Compensation for Harm to the Health of a Citizen Who Has Not Reached 15 Years of Age

In the case of damage to a citizen's health who has not reached fifteen years of age and who has no income, the organization or citizen who is responsible for the harm is obligated to compensate expenses connected with the harm to the victim's health.

CRIMINAL CODE OF THE KYRGYZ REPUBLIC (as of March 1994) City of Frunze, December 29, 1960

Article 112. Pederasty (Sodomy)

Pederasty (Sodomy) is punished by imprisonment for a period up to two years.

Pederacty committed using violence or in relation to a minor or where the victim is a dependent is punished by imprisonment for a period of from two to six years.

CIVIL PROCEDURAL CODE OF THE KYRGYZ REPUBLIC Dec. 29, 1999, Number 147, Bishkek [formerly Frunze]

Article 65 Basis for Releasing the Need for Further Proof

1. Facts recognized by the Court as well known are not required to be proved.

2. A Court is required to adopt decisions by a court in an earlier civil case, they are not to be

argued again and they are not subject to challenge during the litigation of the later civil action in which the same people are parties.

3. A Court trying a case about the civil and legal consequences of the actions of a person sentenced by a court in a criminal case must accept the criminal verdict as proof that the illegal actions causing a criminal conviction were committed by the defendant.

4. A Civil Court must accept the findings by a Court of Arbitration that are relevant to a civil case that are before the civil Court and the issues decided in the Court of Arbitration's findings are not to be revisited in the civil case.

CODE OF CRIMINAL PROCEDURE OF THE KYRGYZ REPUBLIC June 30, 1999
SECTION VI OTHER PROVISIONS

Chapter 16 The Civil Suit in the Criminal Matter

Article 135. Filing of a Civil Action

1. A person who has suffered harm from a crime or an act by an insane person which is forbidden by the Criminal Code of the Kyrgyz Republic, or his representative has a right to bring a civil case at the same time as the criminal case but not after the beginning of the legal hearing.

2. The civil action may be filed in both written and in oral form. An oral declaration will be entered into the trial record

3. A PERSON WHO HAS NOT FILED A CIVIL ACTION DURING A CRIMINAL PROCESS, BUT HAS NOT HAD THE ACTION EXAMINED BY A COURT, HAS THE RIGHT TO FILE A CIVIL CASE. [emphasis]

4. The public prosecutor has the right to file a civil suit in a criminal case when it is deemed by the prosecutor to be necessary to protect the rights of citizens, state interests or public interests.

Translated by Roy Cochran. American Translator's Association qualified translator from Russian into English. July 1, 2008.

See Petitioner Appendix to 08-1152 Reply Brief pp 30-38

LETTER FROM LIBRARY OF CONGRESS
101 Independence Avenue, S.E.
Washington, D.C.20540-3220
LAW LIBRARY-DIRECTORATE OF LEGAL RESEARCH-EASTERN LAW DIVISION,
(202) 707 5085, (202) 707 1820 (FAX)
July 25, 2008 LL File No. 2008-01361

Dear Ms. Woody:

In response to your request of July 23, 2008, concerning selected provisions of Kyrgyz legislation, please find attached photocopies of the provisions in question.

The attached provisions of major Codes were adopted as acts of the Kyrgyz Soviet Socialist Republic in the early 1960's, and remained in force until they were substituted by new laws of the Kyrgyz Republic in the late 1990's. All of these documents were officially published as separate Codes (with included amendments) by the Yurizdat

[YI], the then government printing office for legal materials in Russian, which remains the official language in Kyrgyzstan. The documents we are supplying you are in the same form as they were in effect in 1936.

If you have further questions concerning this issue, please call me at (022) 707-9861 or email me at prou@loc.gov. We hope this information is helpful.

Sincerely,

/s/, Peter Roudik,
Assistant Director of Legal Research,
Chief Eastern Law Division.

Attachment
Ms. Kate Woody address redacted
katewoody@comcast.net

The Law Library of Congress is the foreign legal research arm of the United State Congress. You may contact us at (800) 550-0442 (fax) or law@loc.gov (email. We also invite you to visit our website: http://www.loc.gov/law.

See Petitioner App to 08-1152 Reply Brief pg 39

1936 CONSTITUTION OF THE USSR
Adopted December 1936
CHAPTER I
THE ORGANIZATION OF SOVIET SOCIETY

Article 1. The Union of Soviet Socialist Republics is a socialist state of workers and peasants.

*****

CHAPTER II
THE ORGANIZATION OF THE SOVIET STATE

Article 13. The Union of Soviet Socialist Republics is a federal state, formed on the basis of the voluntary association of Soviet Socialist Republics [15 in number] having equal rights, namely:

The Russian Soviet Federated Socialist Republic

*****

The Kazakh Soviet Socialist Republic
The Kirghiz Soviet Socialist Republic

*****

Article 14. The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of state authority and organs of government covers:

a. Representation of the Union in international relations, conclusion and ratification of treaties with other states;

*****

u. Legislation on the judicial system and judicial procedure; criminal and civil codes; [emphasis]

*****

Article 15. The sovereignty of the Union Republics is limited only within the provisions set forth in Article 14 of the Constitution of the U.S.S.R. Outside of these provisions, each Union Republic exercises state authority independently. ....

Article 16. Each Union Republic has its own Constitution, which takes account of the specific

features of the Republic and is drawn up in full conformity with the Constitution of the U.S.S.R.

*****

Article 19 The laws of the U.S.S.R. have the same force within the territory of every Union Republic.

Article 20. In the event of a discrepancy between a law of a Union Republic and an all-Union law [of the USSR], the all-Union law prevails.

See Petitioner Response Brief to Respondent's Appeal for Sanction 08-1152L (082321) Addendum. pp 68-71

ATTACHMENT TO PETITIONER APPELATE BRIEF 08-1152 LEARNED TREATISE

An Examination of the Modern Soviet Law of Torts, 5 Tul. L. Rev. 3 (1979) Christopher Osakwe, [note: presently Professor of Law at Moscow University]...this study attempts to bring together in one comprehensive piece Soviet statutory law, case law, and doctrine dealing with all aspects of the contemporary Soviet law of torts. It is hoped that as such a synoptic and analytical update of the modern Soviet law of torts will make it relatively easier for the comparative lawyer to glean the present status of the Soviet law of torts from one source. [see Att at page 1]

FN 13 Para 2. The general provisions of the U.S.S.R. F.P. [Fundamental Principles] Civil Legislation. Have been reenacted in the 1964 R.S.F.S.R. Civil Code as well as in the civil codes of the other fourteen Soviet Union republics [including the Kyrgyz SSR]. Purely for the sake of convenience, all civil code references in this study shall be made to the 1964 R.S.F.S.R. Civil Code [Russia]. [Note: the

RSFSR Civil Code has essentially the same provisions as the KSSR Civil Code but 10 sections lower than Kyrgyz Statutes named in the case sub judice]

Vicarious Tort Liability [see 7-8]

The doctrine of vicarious tort liability of fictitious persons under Soviet law was explained as: a juridical person is a collective social entity...The actions of a juridical person are manifested through the actions of its directors, as well as those of its employees... Accordingly, harm caused by the conduct of such individuals is considered to be the harm of the juridical person itself. In order to establish the liability of a juridical person under article 444 of the Civil Code [Article 454 of the KSSR Civil Code],,,,it is necessary to show that the resultant harm is causally connected with the unlawful conduct of its employee acting with fault.... *See*, Att pg 7

*****

A composite picture of the modern Soviet law of vicarious tort liability emerges. First, the employer is vicariously liable for the tort (based on intent, negligence, or strict liability) committed by its employee in the scope of his employment. Second, the employer, for purposes of vicarious tort liability, may be a physical or juridical person. Third, the determination of what constitutes "acting in the scope of employment" must be made on a case by case basis. In making its determination, the fact finder must consider the nature of the business, the accepted custom among those who engage in such business, and any other relevant factors... Fourth, if it is determined that the employee had abandoned

the master's business when the tort occurred, the master may still be held liable if it is shown that the employer was negligent in the selection of the employee or that the employee violated a non-delegable duty. Fifth, any tort committed by an employee on the premises of the employer's business or at any other place where the employee customarily works is presumed to have been committed within the scope of the employment, and consequently, the employer is vicariously liable....

See, Attachment to Petitioner Appellant Brief at pg 8

Petitioner's Correlation Table RSFSR and KyrgyzSSR RSFSR Civil Code 1964 KyrgyzSSR Civil Code 1964
Articles 444-471
Articles 454-481

See Page 59 of Addendum to Petitioner Appellate Brief 08-1152 August 2008.

DECLARATION OF TATIANA IVASCHENKO [Note a review of the actual laws cited in this Declaration produced supra in this Appendix shows the Declarations are not true]

COMES NOW, Tatiana Ivaschenko, who, pursuant to 28 U.S.C. Section 1746 declares under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am over the age of eighteen (18) and have personal knowledge of the statements contained in this Declaration.

2 I am a practicing attorney in Bishkek, Kyrgyzstan with the law firm of Veritas Law Agency, LLC I have been in practice since 1996.

3. I have never been disciplined or disbarred from the practice of law during my professional career.

4. I have reviewed the Amended Complaint in the above-captioned case. I have no knowledge regarding the factual allegations beyond the Amended Complaint and make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

5. The Kyrgyz Republic is a civil law country. It law is written in the form of statutes or subordinate legislation. There is no system of reliance on case precedent.

6. The legal consequences of the conduct alleged by Plaintiff are regulated by the labor, civil, and criminal legislation as well as by the criminal procedure norms n force in the Kyrgyz Republic in 1995, 1996 (with respect to the substantive norms) and 2007 (with respect to the procedural norms.)

7. According to the civil legislation of the Kyrgyz Republic in 1996, a legal entity shall be responsible for its employee's action or inactions, if that employee has caused harm to third parties in the course of performance of his or her employment obligations. See **Art. 455, Civ. Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated, July 30, 1964)**, expired pursuant to the Law of the Kyrgyz Rep. #2 (dated Jan. 5 1998).

8. Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions unless the predicate act, which must have resulted in criminal sanctions, was completed upon the employer's order and control. See **Art. 455. Civ Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated July 30, 1964)**, expired pursuant to the Law of the Kyrgyz Rep. #2 (dated, Jan 5, 1998).

9. In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure by means of: (a ruling of an investigator; and (ii) a court sentence. See Art. 112, Criminal Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR (dated December 29, 1960), expired pursuant to the Law of the Kyrgyz Rep. #69 (dated, Oct 1, 1997); see also **Art. 135 Criminal Procedure Code of the Kyrgyz Rep. (dated June 30, 1999)**; **Clause 3, Art. 65, Civil Procedure Code of the Kyrgyz Republic #146** [Note this should be #147](dated, Dec. 29, 1999).

10. The allegations of the Amended Complaint do not indicate that buggery has been established by the required criminal procedures identified in Paragraph 9.

11. In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages caused by its employee to a third part only in the course of performance by such employee of his/her employment obligations or official duties. An

employer cannot be held responsible for a criminal act (i.e., buggery) committed by the employee, unless the act is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint.

AND FURTHER, THIS DECLARANT SAYETH NOT. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND/CORRECT. EXECUTED ON THIS 25TH DAY OF JULY 2007. /s/Tatiana Ivaschenko JA 408-410

No. 09-1577

In The
Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent *Dated: July 28, 2010*

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Respondent Booz Allen Hamilton, Inc. ("Booz Allen") disagrees with the presentation of the Questions Presented for Review submitted by Petitioner Mark G. Baker ("Baker"). The two questions presented for review, expressed concisely in relation to the circumstances of the case, are:

Did the United States Court of Appeals for the Fourth Circuit (the "Circuit Court") correctly apply Maryland state law to determine whether Booz Allen was liable for its employee's alleged conduct in Kyrgyzstan when Baker invited the application of Maryland law and declined to furnish proof of Kyrgyz law pursuant to FED. R. CIV. P. 44.1?

Did the Circuit Court correctly conclude that, under Maryland negligence law, Booz Allen did not negligently hire, supervise, or retain an employee working in Kyrgyzstan based upon the undisputed material facts contained in the record of the case?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The only parties to the proceeding in the Circuit Court were Plaintiff-Petitioner Baker and Defendant-Respondent Booz Allen.

Booz Allen Hamilton, Inc. is wholly owned by Explorer Investor Corporation, which itself is wholly owned by Explorer Holding Corporation. There are no parents, trusts, subsidiaries and/or affiliates of said party that have issued shares or debt securities to the public.

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OPINION AND ORDER BELOW

This is an Opposition to a Petition for a Writ of Certiorari arising from a decision by the United States Circuit Court For The Fourth Circuit affirming the decision of the United States District Court of the District of Maryland (the "District Court") to grant Booz Allen's motion for summary judgment. The Circuit Court's unpublished opinion is available at *Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476 (4th Cir. Dec. 28, 2009). That opinion is included in Baker's Appendix at A1-A16.

The District Court's order granting Booz Allen's motion for summary judgment is unreported and unpublished. The District Court order is included in Baker's Appendix at A17-A18. The District Court Judge's verbatim recitation of his ruling on Booz Allen's summary judgment motion is set forth in the Booz Allen Appendix at 3a-21a.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The Circuit Court did not rely on any federal constitutional, statutory, or regulatory law to determine that Baker did not establish his Maryland negligence claim. The Circuit Court relied solely on Maryland common law to analyze Baker's claim. *See* A-10. (stating that "[w]e need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail."). As such, there are no constitutional provisions, treaties, statutes, ordinances, or regulations involved in this case.

COUNTERSTATEMENT OF THE CASE

I. Introduction.

In this case, Baker asks that this Court review the Circuit Court of Appeals' application of well-settled (and unchallenged) Maryland law in a negligence case. Baker presents no federal issues for this Court's review. Instead, Baker requests that this Court review two issues of Maryland law.

First, Baker claims that the Circuit Court misapplied Maryland *lex loci delicti* law when it employed Maryland substantive law to determine whether Baker's negligence claims could survive summary judgment. Notably, *Baker argued for the application of Maryland law* in the District Court and the Circuit Court.[1] In an abundance of caution, the District Court applied Kyrgyz law, Maryland law, and Virginia law, and concluded that Baker failed to establish a claim against Booz Allen under the substantive law of all three jurisdictions. *See* Appendix to Brief in Opposition ("App.") at 15a. On appeal, the Circuit Court "accept[ed] Baker's invitation to apply Maryland law" for the sake of argument, and, like the District Court, concluded that Baker's claims were properly dismissed on a motion for summary judgment. *See Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476, 482 (4th Cir. 2009).

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[1] Pursuant to Federal Rule of Civil Procedure 44.1, Booz Allen argued for the application of Kyrgyz law in both the District Court and Circuit Court, while also analyzing Baker's claims under both Maryland and Virginia state law as well.

Baker now requests that this Court review his case to determine whether the Circuit Court – at Baker's insistence – wrongfully applied Maryland substantive law to its determination of his negligence claims. In doing so, Baker reverses his previously stated position that Maryland law should apply and now suggests the application of Kyrgyz law. Baker's argument fails to account for the fact that he sought to have Maryland law apply and that he did not comply with Federal Rule of Civil Procedure 44.1 in seeking the application of foreign law before the District Court.

Second, Baker claims that the Circuit Court misapplied well-settled Maryland substantive law when it concluded that based on the undisputed material facts, "the injury in this case (sexual assault) simply was not reasonably foreseeable injury arising from the alleged negligent hiring, retention and/or supervision of [Brian] Davenport." A-13. Baker does not argue that the Circuit Court applied incorrect legal principles under Maryland law. Instead, Baker disagrees with the District and Circuit Courts' conclusions that Booz Allen cannot be held liable for Baker's alleged injuries because its employment, supervision, and retention of one of its employees cannot be the legal cause of Baker's alleged injuries in light of the undisputed material facts presented in the Record.

II. Counterstatement of Facts.

Booz Allen is a leading management consulting firm. JA 56-57.[2] In 1995, Booz Allen commenced work for the United States Agency for International Development ("USAID") on its project for the Development and Implementation of an effective Bankruptcy System and Law in Kazakhstan and the Kyrgyz Republic ("Bankruptcy Project"). JA 57.

On or about October 1, 1995, Booz Allen entered into a contract with Kathleen J. Woody ("Woody") to provide consulting services as an independent contractor serving as "Chief of Party" to the Bankruptcy Project. JA 66-68; see also JA 32, ¶ 3. *Woody is both Baker's counsel of record and his mother.*

As an independent contractor, Woody's primary work location was in Kazakhstan, but she also had oversight of operations in and traveled to Kyrgyzstan for the Bankruptcy Project. JA 70-74. As Chief of Party, Woody was responsible for fulfillment of the scope of work and deliverables under the Bankruptcy Project task order (i.e., supporting the development of legislation to allow bankruptcy laws to function in private enterprise markets) and supervising expatriate staff. JA 32, 56. Booz Allen terminated Woody's independent consulting contract effective June 7, 1996 – prior to the end of the intended duration of her assignment. JA 76.

---

[2] Reference to JA constitutes a citation to the Joint Appendix in the Circuit Court proceeding.

Baker alleges that, while Woody was performing her duties in Kazakhstan, an employee of Booz Allen sexually assaulted him in March 1996 in that employee's personal residence. Baker never made a complaint to the Kyrgyz police or judicial system regarding the alleged assault. JA 32, ¶ 4. Baker first "remembered" the assault during a hypnotherapy session with a practitioner in London, England, sometime during the winter of 1997 – almost a year after the assault allegedly occurred. JA 204:21-207:10. Prior to his recollection during the 1997 hypnotherapy session, Baker "lied" to his mother about the alleged assault by Davenport on 16 separate occasions. JA 162:19-163:4. In fact, Baker repeatedly admitted throughout his deposition that he had lied about rape allegations in the past – complaining that he had been raped or sexually assaulted when in actuality he had not been raped or sexually assaulted. JA 167:19-168:8 (false allegation of rape at Doctor's Community Hospital); JA 173:16-175:6 (false allegation of rape at the South Coast Medical Center); JA 180:20-182:8 (false allegation of rape at Huntington Beach Hospital); JA 169:1-13 (false complaint of "inappropriate fondling").

The alleged perpetrator is Dr. Brian A. Davenport ("Davenport"). Davenport has been continuously employed by Booz Allen since April 14, 1994. JA 58-59. From November 1995 through June 1996, Davenport was a Senior Consultant on several international and domestic projects, including the Bankruptcy Project. His job duties on the Bankruptcy Project were to "deal with the non-legal, non-lawyer required aspects of performance and scope work under the task order" primarily in

Bishkek, Kyrgyzstan. JA 81. Davenport reported to Woody for "scope of work issues related to the task order itself" but generally reported to the Task Manager on the Bankruptcy Project who was a Virginia-based Booz Allen employee. JA 81, 108.

Baker maintains that Booz Allen knew or should have know that Davenport had "serious emotional disorders." JA 32, ¶ 4. To the contrary, however, Booz Allen had never sanctioned, demoted or disciplined Davenport at any time prior to the alleged sexual assault. JA 78. While Baker represents that four people asked his mother to persuade a USAID official "to accept Davenport as a Booz Allen representative in Kazakhstan and Kyrgyzstan, despite [the official's] objections that Brian [Davenport] was unsuitable for the job based on his prior behavioral problems[,]" App. Br. 4 (generally citing JA 242), the Record is devoid of what "prior behavioral problems" made Davenport "unsuitable for the job."

III. Counterstatement of Procedural Background.

On January 9, 2006, Baker filed a complaint in Maryland state court seeking damages against Booz Allen for negligence. Baker did not name Davenport as a defendant, or otherwise identify him as the perpetrator in his pleadings. Baker has never alleged any cause of action arising under federal law.

Booz Allen timely removed the case to the District Court on April 6, 2006. The District Court possessed subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1) based on the diversity of the parties' citizenship.

On December 19, 2007, the Honorable Rodger W. Titus granted Booz Allen's motion for summary judgment. Judge Titus delivered a detailed oral opinion filling twenty-two transcript pages. *See* App. at 3a-21a. The District Court first applied the principal of *lex loci delecti* under Maryland's choice of law rules and concluded that he should first look to the laws of Kyrgyzstan as the undisputed location of the alleged injury. *See id.* at 12a-14a. The District Court correctly concluded that Booz Allen provided adequate notice of the application of foreign law and sufficiently offered a sworn declaration from a member of the Kyrgyz bar to articulate the applicable substantive law. *See id.* at 13a. Based upon the sworn declaration, the District Court properly concluded that "the law of Kyrgyzstan would not permit liability to be imposed upon Booz Allen under the circumstances of this case." The District Court did not, however, rest its decision solely on Kyrgyz law, taking special care to explain that the ruling considered all three laws that could possibly apply to Baker's negligence claims. *See id.* at 15a-21a.

Applying Maryland law, the District Court correctly concluded that: (1) Maryland recognizes claims of negligent hiring and negligent retention; (2) foreseeability of harm is a required element of Baker's claims; (3) the Record was devoid of any

information that "would indicate that the defendant was aware of a severe or documented emotional disorder of [the alleged perpetrator;]" (4) the Record lacks any information "that would support a conclusion that Booz Allen was on notice that [Davenport] had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks;" and (5) Baker failed to place any material facts in the Record to establish foreseeability on the part of BAH. *See id.*[3]

On January 2, 2008, Baker filed a notice of appeal. JA 550. The Circuit Court had appellate jurisdiction over this lawsuit pursuant to 28 U.S.C. §§ 1291 and 1294(1). On December 28, 2009, the Circuit Court affirmed the District Court's decision that Baker failed to establish his claims under Maryland law. *See Baker*, 358 Fed. Appx. at 484. In so doing, the Circuit Court addressed the two issues presented in the Petition for Writ of Certiorari ("Petition").

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[3] The District Court proceeded to rule that if his first conclusion regarding the application of Kyrgyz law was incorrect, and if his secondary assessment of Maryland law was misplaced, Baker would "fare even worse" under Virginia law. The Circuit Court did not address the application of Virginia law and neither does Baker in his Petition to this Court.

First, the Circuit Court decided to apply Maryland substantive law to analyze Baker's claims based solely on Baker's argument that Maryland law should apply. Specifically, the Circuit Court stated:

> In its decision granting [Booz Allen's] motion for summary judgment, the district court, out of an abundance of caution, held that Baker could not prevail under Kyrgyz (the locus of Baker's injuries), Maryland (the forum state), or Virginia (where decisions concerning Davenport's employment were made) law. Baker claims that Maryland law should apply because [Booz Allen] failed to meet its burden of proving Kyrgyz law and, therefore, Maryland law, as the forum state's law, applies. In particular, he claims that the statutes referenced in [Booz Allen's Rule 44.1 proof of foreign law] are not controlling and, in any event, do not fully explain the breadth of Kyrgyz law.
>
> We need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail.

Baker, 358 Fed. Appx. at 482. The Circuit Court clearly did not analyze or otherwise hold that Kyrgyz law did not apply. Rather, it simply applied the law that Baker sought to have applied.

Second, the Circuit Court applied Maryland negligence law and rejected Baker's claims. Specifically, the Circuit Court, relying principally on *Pittway Corp. v. Collins*, 973 A.2d 771 (2009), concluded that Booz Allen's employment, supervision, and retention could not be the proximate cause of Baker's alleged injuries:

> Legal causation is the policy-oriented doctrine designed to be a method for limiting liability. . . The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. . . .
>
> *****
>
> In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport.

Baker, 358 Fed. Appx. at 483.

Simply stated, the Circuit Court, agreeing with the District Court, applied Maryland proximate causation law and determined that Booz Allen cannot be held liable for Baker's injuries.

IV. Summary of Baker's Argument on Petition for Writ of Certiorari.

Baker now seeks this Court's review of the Circuit Court's decision. In his Petition, seemingly advances three arguments.

First, Baker argues that the Circuit Court incorrectly concluded that Baker's claim fails under Maryland law. See Pet. at 12-18. This argument is three-fold. Baker first claims that the Franken Amendment of the Department of Defense Appropriations Act, Pub. L. No. 111-118 (2009), contravenes the Circuit Court's decision because it simply "shows Federal policy that employer negligent retention, supervision and hiring liability for employee sexual assault in harsh foreign workplaces is a sufficiently common problem that it must be provided for in U.S. legislation." Pet. at 14. Baker does not, however, explain how the Franken Amendment alters the Circuit Court's analysis of Baker's claims under Maryland law.

Baker then argues that the Circuit Court misapplied the rules of law contained in *Pittway Corp.* because that is a "smoke detector case." Pet. at 14-15. Baker does not explain why *Pittway Corp.'s* legal principles are flawed or otherwise inapplicable. Instead, Baker attempts to distinguish *Pittway Corp.* on the grounds that *Pittway Corp.* was not a case involving sexual assault. Baker seems to argue that the scope of what constitutes legal cause should expand depending on the severity of the alleged injuries. Baker does not cite any legal authority for his argument that the Circuit Court

misapplied *Pittway Corp.*, or his theory that the gravity of the injuries allegedly suffered should somehow expand the number of third-parties responsible for the illicit conduct.

Finally, Baker complains that the Circuit Court's decision was unfair for equitable reasons. Pet. at 15-18. Baker argues that federal contractors should "not get a free pass when compromised personnel ... severely injure[s] someone the Federal Contractor knows could be in his path." Pet. at 15. He claims that the expatriate community in Bishkek was akin to a prison from which he could not escape, and blames Booz Allen (and not his mother, who voluntarily moved with Baker to Bishkek to pursue her professional goals) for the alleged injuries. Pet. at 16-17. He complains that the Circuit Court decision "shields" federal contractors from liability even though their security teams are apparently best-equipped to discover dangerous employees. Pet. at 17-18. Baker does not provide any legal authority to support his equitable arguments, nor does he explain how the Circuit Court's decision under Maryland law was incorrect.

Second, Baker maintains that the Circuit Court decision conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009). Pet. at 18-21. Baker interprets *Jones* to stand for the proposition that "sexual assault [is] sufficiently foreseeable and unextraordinary [sic] to support the victim['s] . . . right to sue a company for negligent retention and supervision [of] its employee is greater than the Federal proclivity for favoring

arbitration over litigation." Pet. at 18. Baker does not explain how (or even claim that) he was deprived of his right to sue Booz Allen in a court of law, or how the arbitrability of the tort claims at issue in *Jones* is relevant to the Circuit Court's decision.

Third, and contrary to his position throughout this lawsuit, Baker now contends that the Circuit Court should have applied Kyrgyz law, but not the law that Booz Allen submitted pursuant to FED. R. CIV. P. 44.1. Pet. at 21-25. Baker contends that he could establish his claims if the Circuit Court applied his version of Kyrgyz law. Baker justifies his late production on the grounds that the applicable 1964 Civil Code of Kyrgyz Soviet Socialist Republic was "hard to obtain." Pet. at 22. He does not explain why it was not equally as difficult for Booz Allen to obtain or why he could not obtain it during the almost two years between when he filed suit and the granting of summary judgment.

REASONS FOR DENYING THE PETITION

This Court should deny Baker's Petition because the Circuit Court correctly determined that Baker failed to establish any claim against Booz Allen, and because Baker presents no federal issue for this Court to review on appeal.

I. Baker Failed to Establish His Negligence Claims Under Maryland Law.

The essential elements of a negligence claim under Maryland law are that: (1) the defendant had a duty to protect the plaintiff from injury, (2) the defendant breached that duty, (3) the plaintiff suffered actual injury or loss, and (4) the defendant's breach of duty proximately caused the loss or injury. *See Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 363-364 (Md. 2005). Negligence cannot exist where no duty is due and the existence of such a legal duty is a question of law to be decided by the court. *See id.*; *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1091 (Md. 2005). Only after establishing that a duty exists must a court consider what that duty is and whether sufficient evidence exists to prove that a defendant, by action or inaction, breached that duty. *Rhaney*, 880 A.2d at 364.

The duty of an employer, the Maryland Court of Appeals explained in *Evans v. Morsell*, 395 A.2d 480, 483 (Md. Ct. App. 1978) (internal citations omitted), is "to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an

unfit employee." However, "[t]he concept that all persons owe a duty to all other persons to use reasonable care to protect them from harm must be limited if we are to avoid liability for unreasonably remote consequences." *Henley v. Prince George's County*, 503 A.2d 1333, 1340 (Md. 1986) (also finding that the causation element of a negligence claim requires proof of an appropriate nexus between the assignment of the employee's duties and the injury).

As a threshold statement, the assault Davenport is alleged to have committed is, as a matter of law, not within the scope of his employment with Booz Allen and, thus, the doctrine of *respondeat superior* is not applicable to the Court's inquiry. *See Wolfe v. Anne Arundel County*, 821 A.2d 52, 62 (Md. 2003) (finding that a law enforcement officer who commits rape is not acting within the scope of his employment). Moreover, there is no general duty to control the conduct of a third person so as to prevent him or her from causing physical harm by criminal acts or intentional torts, absent a special relationship. *See Horridge v. St. Mary's County Dept. of Soc. Servs.*, 854 A.2d 1232, 1239 (Md. 2004). In the present case, Baker neither alleged nor proved any special relationship between himself and Booz Allen.

Assuming *arguendo* that the *respondeat superior* doctrine applied and further assuming the existence of a special relationship between Baker and Booz Allen, the undisputed material facts do not permit a reasonable fact-finder to conclude that the alleged actions of Dr. Davenport were in any way reasonably foreseeable. *See Henley*, 503 A.2d at

1340 (stating that "[t]he concept that all persons owe a duty to all other persons to use reasonable care to protect them from harm must be limited if we are to avoid liability for unreasonably remote consequences."); *see also Rhaney*, 880 A.2d at 368 (finding that a student's prior suspension for fighting and disorderly conduct related to an incident outside of a school cafeteria insufficient, as a matter of law, to put school on notice that it was reasonably foreseeable that the student was likely to punch his roommate).

Indeed, in a case with a strikingly similar factual predicate, the Maryland Court of Appeals held that a party who alleges that another party knew or should have known about a third party's alleged propensity for violence, without more, is not a sufficient factual allegation from which a duty may arise. *See Pendleton v. State*, 921 A.2d 196, 221 (Md. Ct. App. 2007). In *Pendleton*, the claimant and his mother, being homeless, were placed in a temporary shelter by one of the state representatives. Thereafter, when the claimant was 10 years old, he was removed from his mother's custody and placed in foster care. State officials then placed the claimant with a licensed residential child care provider. He was assigned to share a room in the residential group home with a 16-year-old male. The claimant allegedly was sexually and physically abused, and battered by that male. *See id.* at 200.

The only allegation of fact the appellant made with regard to the knowledge the [State Defendants – delete State?] had of the situation of with which it was charged was:

> Upon information and belief, the State and its Foster Care Program officials as well as Defendants Barnett Carroll and Cecelia Carroll were aware of (or should have been aware of) the sexual tendencies, deviousness and history of sexual assaults of Wratchford, and taken care not to place [appellant] in danger of being sexually assaulted by him.

Id. (noting that Plaintiff did not allege that Wratchford had committed assaults prior to those alleged by the appellant or that the State had knowledge of any sexual tendencies Wratchford may have had or that he had a history of sexual assaults). The Maryland Court upheld the trial court's dismissal of the claimant's amended complaint, for failure to plead facts sufficient to establish a duty on the part of the State. *See id.* at 221.

In the case at bar, the Circuit Court relied on *Pittway Corp.* for the proposition that a defendant's conduct must be the legal cause of the injuries sustained. *Baker*, 358 F.3d at 483. Baker insists that the Circuit Court's application of *Pittway Corp.* is in error, but does not challenge the principles that the Circuit Court applied. Pet. at 14-15.

Pittway Corp. simply stands for the proposition that a plaintiff's injuries must be a reasonably foreseeable result of the defendant's conduct for the defendant to be held liable. *Pittway Corp.*, 973 A.2d at 787-791. *Pittway Corp.*, citing well-established Maryland law, reiterated that:

> In applying the test of foreseeability . . . it is well to keep in mind that it is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm, and to avoid the attachment of liability where, in the language of Section 435(2) of the Restatement (Second) of Torts (1965), it appears "highly extraordinary" that the negligent conduct should have brought about the harm.

Pittway Corp., 973 A.2d at 788.

Applying these legal principles, the Circuit Court concluded that an alleged sexual assault occurring outside of business hours at a personal residence of an employee was not the foreseeable result of Booz Allen's decision to employ the employee. Baker offers no authority contrary to the Circuit Court's position.

In sum, the Circuit Court correctly applied Maryland law to Baker's claims. The undisputed material facts did not permit Baker's negligence claims to survive because he could not, and did not, prove each of the elements of a negligence claim under Maryland law.

II. Baker Failed to Present or Establish His Claims Under Kyrgyz Law.

The Circuit Court did not err in its analysis of the application of Kyrgyz law.

First, Baker sought the application of the very law – Maryland law – he now contests. A-10.

Second, even if Kyrgyz law *must* have been applied to the case at bar, the presentation of Kyrgyz law through the Declaration of Tatiana Ivashchenko accurately and sufficiently demonstrated that Baker's claims failed as a matter of Kyrgyz law. *See* App. at 13a-15a.

Third, Baker did not satisfy the procedural requirements under FED. R. CIV. P. 44.1 with respect to the presentation of foreign law. Indeed, the only party that identified Kyrgyz law as applying was Booz Allen, as evidenced by the District Court ruling from the bench. *See* App. at 13a.[4]

For the foregoing reasons, the Circuit Court did not err when it concluded that Baker failed to establish his negligence claims under Maryland law, as opposed to Kyrgyz law. The Circuit Court's decision was correct, and this Court should accordingly deny the Petition.

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[4] Booz Allen tendered a declaration made pursuant to 28 U.S.C. § 1746(B), by Tatiana Ivashchenko – a member of the Kyrgyz bar that was properly considered by the District Court. *See Bonstingl v. Maryland Bank, N.A.*, 662 F. Supp. 882, 884 (D. Md. 1987) (noting that courts may consider affidavits of foreign attorneys for analysis of issues affected by foreign law).

III. Baker Presents No Federal Issues For This Court To Review.

In addition to the reasons stated above, this Court should deny Baker's Petition because Baker does not present any compelling reasons for which this Court normally exercises its discretionary right to review.

First, the Circuit Court's decision does not conflict with the decision of another United States court of appeals. *See* SUP. CT. R. 10(a). The Circuit Court applied Maryland procedural and substantive law to determine whether Baker established a claim for common law negligence. Baker contends that this case conflicts with the decision of the United States Court of Appeals for the Fifth Circuit in *Jones*, 583 F.3d 228. The issue in *Jones*, however, was whether tort claims arising from a sexual assault by an employee were subject to arbitration because the plaintiff's employment contract required all claims "related to her employment" to be arbitrated. *Jones*, 583 F.3d at 230.

The *Jones* case, contrary to Baker's contention, is not in conflict with the Circuit Court decision. The Court in *Jones* simply determined that tort claims fell outside the scope of an arbitration agreement and, therefore, the plaintiff could pursue her remedies in court. *Jones* has nothing to do with whether the conduct alleged constituted the torts claimed. *Jones* did not apply Kyrgyz or Maryland law. Indeed, the plaintiff in *Jones* was originally based in Texas, than in Iraq. Neither Maryland nor

Kyrgyz law is implicated in *Jones*. In short, *Jones* is wholly inapposite to this case.

Second, the Circuit Court's decision did not decide any federal question – let alone an important one – in a way that conflicts with a decision made by a state court of last resort. *See* SUP. CT. R. 10(a), (c). Baker demands that this Court review the Circuit Court's decision which applied Maryland procedural (*lex loci delicti*) and substantive (negligence) law. Ironically, Baker now requests that this Court review the Circuit Court's decision to apply Maryland law – a decision made at Baker's request. Baker never filed a Rule 44.1 notice of application of Kyrgyz law at the District Court level. Indeed, Baker requested the application of Maryland law at the Circuit Court level. In any event, as set forth above, Baker's claims fail under either Maryland law or Kyrgyz law. The Circuit Court's decision did not rely on or implicate the interpretation or application of any federal constitutional, statutory, regulatory provision, or of any rule of civil procedure. This Court has no reason to review Baker's case because it does not implicate any federal law.

Third, the Circuit Court's decision does not depart from the accepted and usual course of business in a way that involves this Court's supervisory power. *See* SUP. CT. R. 10(a). Baker contends that the Circuit Court "made public policy" through its decision. Instead, the Circuit Court simply applied Maryland common law to conclude that Baker could not establish that Booz Allen's alleged conduct could have proximately caused any

damage. Indeed, Baker does not even allege that the Circuit Court acted inappropriately.

Fourth, Baker's challenge to the decision is simply that the Circuit Court misapplied properly stated rules of law, which is not a proper subject of review. *See* S. Ct. R. 10. Baker's appeal on this point is essentially twofold. Baker challenges the Circuit Court's application of Maryland *lex loci delicti* doctrine, even though the Circuit Court adopted Baker's position that Maryland substantive (negligence) law applies. Baker then challenges the Circuit Court's application of Maryland common law of proximate causation. Baker does not challenge the interpretation or characterization of either the Maryland *lex loci delicti* rules or the proximate causation rules applied by the Circuit Court.

This Court will not ordinarily grant *certiorari* to review questions of state law decided by federal courts of appeal. *See Haring v. Prosise*, 462 U.S. 306, 314, n. 8 (1983) (standing alone, a challenge to a state-law determination by the court of appeals will rarely constitute an appropriate subject of this Court's review). This is so because lower federal courts are deemed, by this Court, to be more familiar with the laws of the states of their jurisdictions. *See Granberry v. Greer*, 481 U.S. 129, 136, n. 9 (1987). In essence, this is exactly the nature of review Baker seeks this Court to conduct.

In short, Baker presents no compelling reason or federal issue for this Court to review the Circuit Court's decision.

CONCLUSION

This case presents no federal issue for this Court to consider. Instead, Baker requests that this Court review the Circuit Court's decision to apply unchallenged Maryland procedural and substantive law to conclude that Baker did not establish a negligence claim against Booz Allen. There is no reason for this Court to review the Circuit Court's application of settled Maryland law. Accordingly, this Court should deny Baker's Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MARYLAND

MARK BAKER,
Plaintiff,

vs Civil Action: RWT-06-0889

BOOZ ALLEN HAMILTON, INC.,
Defendant.

Wednesday, December 19, 2007
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Court Judge, in courtroom 2C AT 2:04 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS THE PROCEEDINGS AS RECORDED AND REQUESTED BY COUNSEL.

APPEARANCES:
On behalf of the Plaintiff:
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On behalf of the Defendant:
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Official Court Reporter
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* * *

relationship with that child who is being babysitted. The employer has no relationship with that invitee that comes on the premises.

THE COURT: What would happen if the gentleman in question had gotten into a cab outside of the Booz Allen offices and got into a dispute about a fare and punched the cab driver? Could the cab driver sue Booz Allen?

MR. WOODY: I don't know. That cab driver is a Kazakhstan citizen, number one, and I'm not here to argue whether he would have right or not. I only know we're talking about American citizens who were there in Kazakhstan where Kazakhstan law would not apply, but there was a duty for these particular individuals.

I'm not talking about respondeat superior, Your Honor. I'm talking about negligent retention. Negligent retention deals with notice given to employers. This was an employee who was the one who was responsible for giving the notice and who did give the notice in reference to an employee to whom a responsibility was owed and a special relationship existed.

THE COURT: Anything further?

MR. ROBINSON: No, sir, Your Honor.

THE COURT: Okay.

On January 9, 2006, the plaintiff, Mark Baker, filed an action in the Circuit Court for Montgomery County against the defendant, Booz Allen Hamilton, Inc. That complaint, which has since been amended, together with all other pleadings in that case, was removed to this court by the defendant, where it was received on April 6, 2006.

Shortly thereafter, Booz Allen filed an answer to the complaint, and the plaintiff filed a motion to remand the matter to the state court which was denied by the court on June 22, 2006.

In January of this year, counsel for the plaintiff, Henry Wile, entered his appearance, and on January 25th filed a motion for leave to file an amended complaint, which the court granted on March 9, 2007. The amended complaint is the applicable document that is now before the court.

In that amended complaint, Baker alleges that his mother was employed by Booz Allen, and in her capacity as an employee of Booz Allen was dispatched to Kyrgyzstan to perform services for the company. It is alleged then in about March of 1996, while she was in Kyrgyzstan performing her duties, the plaintiff, who was then a minor residing with his mother, was raped and sodomized by an employee of Booz Allen, and that he threatened the plaintiff not to tell his mother.

It is alleged that Booz Allen knew or in the exercise of reasonable care should have known that the gentleman in question had a serious emotional disorder who had previously requested that he be returned to the United States as a result of said emotional disorders.

It's also alleged that Booz Allen was negligent in a variety of ways enumerated in Paragraph 5 of the complaint, including failing to consider adequately the reports of employees that he was suffering from emotional disorders which were likely to result in his actions perpetrated against the minor plaintiff as described in the complaint; that Booz Allen failed to foresee that its employee's actions perpetrated against the minor plaintiff would be carried out; that it failed to warn or provide plaintiff's mother with notice of its employee's emotional disorder; that it failed to provide plaintiff with adequate security which could have prevented the acts perpetrated against him by its employee, and that it was negligent in further ways that would be shown at trial.

Then it's alleged that the plaintiff suffered serious and permanent injuries and cause to expend large amounts of money for ongoing medical care and treatment, sustained loss of earnings and loss of future earnings capacity, and has endured and will continue to endure great pain and suffering, both physical and mental; and then there is an addendum clause demanding judgment for $10 million.

The case has proceeded through discovery with a few bumps in the road with discovery

disputes, but the matter is now before the court on the defendant's motion for summary judgment which was filed by it on July 30 of this year.

The matter before the court is a summary judgment motion which is authorized if the pleadings, depositions, answers to interrogatory, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party's entitled to judgment as a matter of law.

I am required to and will view the evidence in the light most favorable to the nonmoving party, and I will -- and a material fact is one that might affect the outcome of the suit under governing law.

To avoid summary judgment, the nonmoving party may not rest upon mere allegation or denial of his pleading but must set forth specific facts showing that there is a genuine issue for trial.

The factual record of this case that's been developed before me has documented a number of undisputed facts. One fact that is heavily in dispute is whether or not the homosexual rape of the then minor plaintiff occurred at all. The defendant vigorously disputes that and indicates that this is someone who has previously reported about making -- reported rape allegations that it contends were false. So, it is a matter of vigorous dispute with Booz Allen that this ever took place.

Nevertheless, Booz Allen, as it must for purposes of a summary judgment motion, has

conceded that for purposes of the motion the court should assume that the homosexual rape of the then minor plaintiff took place, but it argues that on the basis of the uncontroverted facts that are not in material dispute that it is entitled to judgment as a matter of law, even if the rape occurred which, as I noted, it disputes does not dispute for purposes of the motion.

I've already reported that the complaint indicates that the plaintiff, when he was ten years old, went with his mother to Kazakhstan, and that his mother was responsible for supervising project staff and reported directly to two persons in the Virginia office of the defendant named Norman Kirsch and Sally Everett.

The employment of the plaintiff with the defendant apparently ended sometime in 1996. The employee at issue in this case is named Davenport, and he was hired by the defendant in April 1994 and is still employed by the defendant. At the time of the alleged homosexual rape, he worked on the same project as the plaintiff's mother and reported directly to her. It not controverted that at no time prior to the alleged rape was he ever disciplined or demoted.

Ms. Woody testified in deposition that she reported several incidents involving Mr. Davenport to Kirsch and Everett, and she did report on a car trip that had been taken by the plaintiff, his mother and Davenport between two towns in Kazakhstan and Kyrgyzstan sometime around New Year's Eve in 1995. Apparently, this trip was a lengthy trip -- something in the neighborhood of three hours, if I

recall correctly -- and that there was a driver and Mr. Davenport was in the front seat. Apparently, the plaintiff, who was a young child, was making noise that was not to the liking of Mr. Davenport, who apparently was tired, and it is alleged that he pointed his finger in the plaintiff's face and said in a threatening manner, "If I don't get my REM sleep, I'm going to explode, and the plaintiff's mother claims that she reported that incident to Booz Allen immediately.

It's also alleged that -- or there's information before me that appears not to be controverted that Mr. Davenport complained to the plaintiff's mother that he wanted to leave central Asia and go back to the United States.

She also alleges that she reported to the defendant that Davenport had told her -- told the plaintiff to be quiet at a party, and that he was going to get him.

Ms. Woody also alleges that she told Booz Allen that Davenport should be relieved of his duty and she wanted him out of there, and that he was a danger to her and her family.

She's also alleged that there were incidents involving Mr. Davenport throwing office supplies at the plaintiff, or at least that the plaintiff told her that; that she reported this behavior to officials of Booz Allen, and she makes allegations of other threatening conduct by Mr. Davenport. Specifically, she, Ms. Woody, was told Davenport had thrown things in the office, and also observed him wag his

finger at staff in close proximity, yell at staff, and threaten staff with firing.

Finally, she claims that Mr. Davenport also slapped two staff members.

In support of these allegations, the plaintiff also submits an affidavit of -- I'll spell it. K L Y U C H N I K O V -- let Tracy get that -- and I'll just say "Mr. K" -- purporting to corroborate Ms. Woody's claims of her reporting of incidents to her supervisors.

He reports that he overheard Ms. Woody tell Kirsch and Everett of her concern that Davenport was becoming erratic and more explosive and acting in a physically and emotionally abusive manner towards her staff.

He also reports hearing Woody pleading with her supervisors to send Davenport back to the United States before he seriously hurt her or plaintiff.

While the complaint, which I previously alluded to and paraphrased, specifically alleges that Booz Allen knew or should have known that Mr. Davenport was a person with a serious' emotional disorder, there is nothing in the record to indicate that in fact he had a serious emotional disorder. There is uncontroverted information about abusive behavior, but there is no documentation in this record indicating that there is a diagnosed, documented emotional disorder of any nature whatsoever -- or at least of any nature that was

communicated to Booz Allen, other than communication to Booz Allen of incidents of abuse to the staff, slapping somebody twice and otherwise acting in an emotional and obnoxious manner.

The plaintiff himself in his deposition, when asked to address the question of whether it was foreseeable that Davenport would do something, said that, "I suppose Booz Allen had no way of foreseeing that Davenport was going to perpetrate such a heinous crime against the child. There is no way they could have known." That's from the mouth of the plaintiff himself in his deposition.

Ms. Woody has conceded that she had no knowledge that Davenport ever sexually assaulted anyone, whether heterosexual or homosexual, prior to the incident, or he assaulted any child. There were two coworkers who testified that they could not recall any behavior that indicated Davenport had a sexual obsession or fascination with the plaintiff or that he would be violent or commit a sex crime or assault. I pressed counsel today at argument as to whether there was any information that any sexual assault had been committed on anyone or whether in connection with, for example, the slapping incident or incidents of that nature anyone had ever received medical attention, ever been prosecuted, ever made a claim, and the answer was no.

I have a number of miscellaneous motions before me that all relate to the summary judgment motion which is the principal motion before me. I'll briefly address them.

There were affidavits submitted by plaintiff in opposition to the motion for summary judgment by Leo Surla, Irina Zippman, and "Mr. K." For various reasons, the defendant argues that I should strike those affidavits in their entirety. I am not going to go through these affidavits line by line and parse them. I will, first of all, tell you that I'm well aware of the standard of what is proper to be considered in a summary judgment affidavit. If there's something that is not based on personal knowledge, I will not consider it; if there's something that is inadmissible hearsay, I will not consider it; and if there's something that's in violation of an order of this court, I won't consider I it.

With regard to the affidavits of Surla and Zippman, Judge Connelly of this court, after refereeing some earlier discovery disputes, entered an order of November 6 stating that the plaintiff must re-answer and/or supplement interrogatory answers and responses to requests for production of requests not later than January 15, 2007. Just to get the point across, he said, "This deadline is a hard cutoff date. Information not produced or provided by January 15 will no be admitted for purposes of this litigation."

It's suggested that I should not consider the affidavits of Surla and Zippman because it's in violation of Judge Connelly's order. I'm not certain how important to the overall resolution of this case those affidavits are, but I'm going to deny the motion to strike. While these persons were not identified until June, more than five months after the January deadline, I have to consider also that Judge

Connelly, thereafter, extended the discovery deadline to June 29. So, I'm simply not going to strike those affidavits.

With respect to the affidavit of "Mr. K." First of all, to the extent that the motion seeks to strike the entire affidavit, I'm going to deny it. I don't think that the affidavit should be stricken in its entirety. Clearly, this gentleman was identified -- perhaps not to the satisfaction of the defense -- in January of this year, but I don't believe that there's enough here to completely strike the affidavit.

Now, the affidavit of "Mr. K" has contents which perhaps are on a different footing than the question of striking the entire affidavit. First of all, the affidavit contains what the -- is contended is hearsay statements by "Mr. K" about conduct of Davenport and the reporting of that conduct. It is clear to me that the purpose of this affidavit is to place before me information from "Mr. K" that is not provided to me for the purpose of establishing the truth of the matters but, rather, to simply establish that there was communication of these facts to Booz Allen. Therefore, to that extent, in terms of notice to the defendant, I will deny the motion. The only place where I have pause for concern is in -- there's some information in here -- for example, Paragraph 14 is completely irrelevant to this case. It's talking about security issues generally and nothing do with Mr. Davenport. Paragraph 24 is simply him saying that Ms. Woody told him something and that, I don't find, would be appropriate to consider. As I said, in general, I'm going to consider the affidavit, and I'll

just close my eyes when I get to something that doesn't belong before me.

Now, with those preliminary observations about the discovery disputes and issues in this case, now let me go to the merits of the case. The first question before me is what law to apply. This is a federal court, sitting in diversity jurisdiction. First, the court will apply the choice of law rules of this state. Maryland follows the principle of lex loci delicti. When events giving rise to a tort action occur in more than one state, the law of the place where the last act occurred is defined as the place where the injury occurred.

In this case, there is no dispute that any injury that allegedly was suffered by the plaintiff was in Kyrgyzstan. Therefore, applying the choice of law rules of the state of Maryland, I should look to the laws of Kyrgyzstan, at least initially, and ascertain the law of that jurisdiction to the extent that I can.

Now, the defendant, when we get to the application of the laws of the potential sources of law in this case, argues that there is -- that the plaintiff must demonstrate that the -- that he was raped by Davenport, which they're conceding for purposes of this motion only, and otherwise vigorously dispute it, but must show that the defendant had some degree of knowledge or notice that the rape was reasonably foreseeable, and then it argues that under the laws of Kyrgyzstan, Maryland, or Virginia, the plaintiff cannot establish the existence of a duty or breach

thereof under the facts of this case as viewed in the light most favorable to the plaintiff.

Now, it's been -- I've had an affidavit offered to me from a attorney named Tatiana Ivashchenko -- I think I got that close to correct. It's I V A S H C H E N K O. She points out, after identifying herself as a member of the bar and that she has experience of ten years in the laws of that country, that this is a civil code or civil law jurisdiction, unlike the United States, where all but Louisiana are common law jurisdictions, and have a system based on case precedence, rather than on a civil code.

She indicates that a legal entity is responsible for its employee's actions or inactions if that employee has caused harm to third parties in the course of the performance of his or her employment obligation's but notes that even if an employee were to cause harm to a third party in the course of the performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions, unless the predicate act, which must have resulted in criminal sanctions, were completed on the employer's order and control.

Now, the plaintiff objects to the timeliness of the submission of this affidavit under Rule 44.1 and argues that it is untimely. I do not agree. The defendant has clearly raised it in its motion; attached, it in an affidavit. If the plaintiff was unhappy with the content of the affidavit, the plaintiff could also have submitted an affidavit of

somebody submitting information to me on the laws of Kyrgyzstan.

Anybody applying Maryland law would know that it would not be a surprising turn of events if a defendant properly analyzing the law were to suggest to me that that's the law that should be applied. So I therefore reject any notion that the notice of reliance upon foreign law is untimely, and I will therefore look at the law of Kyrgyzstan to the extent that I can interpret it.

I will point out that if -- that a court is -- may, but I don't have any books back in my law library from Kyrgyzstan -- may conduct an independent research to determine foreign law. I have no duty to do so, and I have the right to insist that the proponent of the foreign law present evidence on the question. If insufficient information on the content of foreign law has been provided, I may presume that the foreign law is the same as the local law.

I have been advised by counsel at argument today that the Kyrgyzstan lawyer was asked to advise about the law of employer liability for torts that harm third persons and that this was the answer given and that there was no explication of an alternative basis of liability such as is recognized in some jurisdictions for negligent hiring, supervision or retention. It would appear that the Kyrgyzstan law has a relatively narrow scope of employer liability for actions such as the nature alleged in this case. I have no reason to dispute that, and it seems to me that the law of Kyrgyzstan would not permit

liability to be imposed upon Booz Allen under the circumstances of this case.

I will not, however, rest any decision on such a simply relying solely upon Kyrgyzstan law, and I will address the question of whether or not there is a possible basis for liability under either Maryland law or under Virginia law which clearly, at least on the basis of the affidavit supplied to the court, is more generous in imposing liability on an employer on grounds other than strict respondeat superior.

Before I do that, I do note an allegation or suggestion is made that Kyrgyzstan law would be offensive to Maryland public policy because it appears to negate employer liability under respondeat superior under the unique circumstances that I just mentioned a moment ago in terms of there needing to be a criminal sanction and that it must have been completed upon the employer's order and control. There's a suggestion made that that violates Maryland public policy. I have not been referred to any Maryland case that would reject that law as offensive to Maryland public policy. And while I recognize that Maryland does under some circumstances decline to apply foreign law's offensive, Maryland public policy -- merely because Maryland law is dissimilar to the law of another jurisdiction does not render the law -- the latter contrary to Maryland public policy, and I find nothing in Maryland public policy that would make Kyrgyzstan law offensive or sufficiently offensive to call for this court to reject it.

Now, if one were to apply Maryland law, I don't think that the plaintiff fairs any better. In order to maintain an action for negligent hiring and retention under Maryland law, the plaintiff must prove the existence of an employment relationship, which clearly is established; the employee's incompetence, the employer's actual or constructive knowledge of such incompetence, the employer's act or omission causing the plaintiff's injuries, and the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Maryland has long recognized an employer's duty to the public to use care in hiring and retaining employees. The parties have mentioned, as they should, some cases in the Maryland Court of Appeals that have addressed this tort action, assuming for the purposes of discussion that Maryland law would apply and that Kyrgyzstan law either doesn't apply or is somehow offensive to Maryland public policy.

In Henley, the Court of Appeals, the highest court, narrowed the concept of duty to embrace only those persons or classes of persons to whom harm of some type might reasonably have been foreseen as a result of the particular tortious conduct. The court of appeals in the Pendleton case, handed down this year, in evaluating that question of whether one party's entitled to protection of or is under an obligation of the other party involves consideration to have following factors: The foreseeability of harm to the plaintiff; the degree of certainty that the plaintiff suffered the injury; the closeness of the connection-between the defendant's conduct and the

injury suffered; the moral blame attached to the defendant's conduct; the policy preventing future harm; the extent of the burden to the defendant; and the consequences to the community of imposing a duty of exercising care with resulting liability for breach; and the availability, cost and prevalence of insurance for the risk involved.

In this case I have examined the record with care, with a view to giving all of the inferences in favor of the nonmoving party. I have not found anything in this record that would indicate that the defendant was aware of a severe or documented emotional disorder of Mr. Davenport.

I've received no information in this record that would support a conclusion that Booz Allen was on notice that this employee had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks. All I do have is some incidents of obnoxious behavior -- two instances of slapping someone, and bitter complaints by the plaintiff's mother to her employer that this man should be sent home.

I conclude that under Maryland law, if it were to apply, the foreseeability of the harm to the plaintiff would be clearly called into serious question, and I think the fatal question by the rulings of the Court of Appeals of Maryland in the Henley and Pendleton cases.

The defendant has also brought to my attention some cases from other jurisdictions such as Florida, with the K.M. versus Publix Supermarkets,

Inc. case which involved a seven year-old plaintiff on whose behalf an action was brought against his mother's employer after she entrusted the child to a coworker at the coworker's home, and it was alleged in this case that the employer knew the coworker had been convicted of attempted sexual battery, and the court affirmed the trial court's finding that the employer did not have a duty to control an employee off duty not then acting for the employer's benefit and not on the employer's premises and not using the employer's equipment. While that case is not precisely on all fours, that is powerful precedent for the notion that under the circumstances of this case there is no liability.

The plaintiff points out that this was not simply a grocery store employee but somebody who was sent to a far distant country and couldn't have been there but for the authorization of the employer. I take that into account, but the bottom line is that this was an act that took place not in the employer's premises and certainly not authorized by the employer such that respondeat superior would apply, and a reasonable employer knowing the information that has been brought to my attention by the plaintiff and viewing that light in the -- that evidence in the light most favorable to the plaintiff, I cannot conclude that under the appropriate application of the summary judgment standard, that the plaintiff could prevail in this motion.

Another case that has addressed some of these issues is Rhaney, in which the court reasoned that its view of foreseeability is not nearly wide enough to include a possible result but deals more with

probability of that result, and I conclude, as did the court in the Rhaney case, that slapping two fellow employees is not sufficient to create a foreseeable risk of the probability of a sexual assault.

Therefore, I conclude that if I were to apply Maryland law, which I conclude I do not need to apply but alternatively will apply to the extent that my analysis of the Kyrgyzstan law issue is incorrect, I conclude that the plaintiff has failed to meet his burden of showing that the defendant knew or should have known that the defendant was potentially dangerous. "Dangerous" meaning a danger of committing a sexual or other violent assault.

Finally, to the extent that my analysis of Kyrgyzstan and Maryland law is incorrect, and to the extent that because of the base of employment being in Virginia and the hiring decision taking place in Virginia, the plaintiff does not fair any better. In fact, it fairs worse. Under Virginia law, liability for negligent hiring is predicated on the negligence of an employer in placing a person with known propensities or propensities which should have been discovered by a reasonable investigation in an employment position in which because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a risk -- a threat of injury to others.

Virginia does recognize a separate claim for negligent retention in which an employer may be liable where it knew or should have known the employee was dangerous and likely to harm others.

I've already concluded that that is not the case here and that Virginia law is simply not helpful to this case to the extent if I were to apply it.

The defendant has made some additional arguments that I will just address briefly, but I don't think I need to address these issues at all, in light of my conclusions on the absence of any basis for liability. But to the extent there is any liability, I conclude that the plaintiff is not entitled to some of the damages that he claims. He has made claims for medical expenses, but the medical expenses occurred before he was 18, which were not pursued by his parents, and which are now barred by limitations, and are not before the court and will not be before the court in any damage claim; and it is uncontroverted that since he achieved the age of majority, he has not had any medical expenses. So, I conclude that this claim would not be one in which medical damage recovery could occur.

The second question that's raised by the defense is that they cannot demonstrate a linkage between his present emotional problems and the incident in this case because of an intervening alleged rape that occurred in 2002 at Washington Adventist Hospital. I agree with the plaintiff on this, that this is a question that would not eliminate damages but would, rather, call for some sort of apportionment to the extent that the proof at trial would allow a finder of fact to apportion it. So, I would, to the extent that it's seeking to eliminate any damages because of the intervening incident -- I do not believe that the defendant is correct, but I

just make those observations because they are not relevant any longer because of my conclusion.

Therefore, I will enter an order for the reasons that I have just stated on the record which grants the defendant's motion for summary judgment which is paper 56 and denies the motion in opposition filed by the plaintiff which is document 79.

Thank you very much.

(Off the record at 3:50 p.m.)

(3)

No. 09-1577

Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY TO BRIEF FOR RESPONDENT BOOZ ALLEN HAMILTON IN OPPOSITION

Petitioner, Mark Baker, submits this reply to the Brief in Opposition ("BIO) filed by Respondent.

I. Negligent Retention and Supervision Oversight of Employees by Federal Contractors Executing U.S. Foreign Policy Is a Major Problem for the United States For Grave Injury to Others Including Sexual Assault, Murder and Heinous Crimes Making the Question's Implications Far Reaching and Worthy of This Court's Review

The United States has a problem as U.S. foreign policy and military goals are increasingly contracted out to private Federal Contractors by the State Department through its U.S. Agency for International Development [US AID], and Department of Defense [DOD]. As U.S. military forces are reduced overseas, Federal Contractors are used to fill the gap and the U.S. government has neither sufficient personnel to monitor Federal Contractors nor funding to hire more oversight personnel in the present economy.[1] If private citizens effectively cannot sue for sexual assault and there are not enough federal oversight personnel, there is nothing to stop Federal Contractors' foreign operations from being no-man's land. A Federal contractor at U.S. Headquarters can ignore warnings by on-site supervisors in remote areas of danger of grave physical harm by an unfit employee and then

[1] The Commission on Wartime Contracting states that not enough oversight personnel from the U.S government for Contractors. National Public Radio [NPR] August 3, 2010 Grant Green, Bipartisan Commission on Wartime Contracting.

abnegate responsibility. As Federal Contractors execute more U.S. foreign policy and military objectives in harsh, sensitive and remote areas of the world, this problem will grow. Already, in Afghanistan Foreign Contractors viewed as abusive and overbearing caused President Karzai to sign a Decree on 8/17/10 requiring foreign private security contractors to disband by year end. U.S. officials worried that losing nearly 30,000 armed guards would hurt aid and development work. TIME, Vol. 176, No.9/2010.

Booz Allen Hamilton [BAH/Respondent] describes itself as a leading Federal Contractor management consulting firm. Petition at 5 (hereinafter Pet:5). BAH was the Federal Contractor for the US AID Project for Bankruptcy in Kazakhstan and Kyrgyzstan with Defense Base Act insurance for its employees and independent contractors from October 1, 1995 through September 30, 1996. The U.S. Defense Appropriations Act 2010, 123 Stat. 3409, § 8116(a)(1) and (2) applies to Federal [Defense] Contractors, their employees and independent contractors specifically providing that negligent retention and supervision for sexual assault cannot be waived by an employee or independent contractor as a term of employment for the sake of arbitration. Pet:2-3. The U.S. Supreme Court takes law as it finds it at the time of consideration of cases, Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) Pet:13 including this Federal law.

The Fifth Circuit Court in Jones v. Halliburton, 583 F.3d. 228 (5th Cir. 2009) like the Fourth Circuit in this case involved Federal Contractor negligent retention and supervision for employee action

removed by Defendant to Federal Court for diversity. Both involved large, powerful Federal Contractors making huge profits as 'management consultants' that did not do what they were paid for by the Federal Government which was to manage. Both negligently retained and supervised employees that were reported from the field to be unfit and dangerous. The Fifth Circuit in Jones reasoned that being raped could not be considered part of the victim's job. However, the Fifth Circuit reasoned that this did not rule out that a court could consider the employees who committed the sexual assault could have been within their job because of violation of the ethics rules that applied to them as Halliburton employees. Jones at 237.

This case became more than an isolated case of domestic product or personal liability when the decision contravened Federal law, conflicted with other Circuit Court of Appeal jurisdictions and had major international ramifications on whether the U.S. can conduct foreign policy and military actions through Federal [Defense] Contractors for whom there is little Federal oversight. The Fourth Circuit opinion in this case allows Federal Contractors to abnegate responsibility for failure to manage by saying sexual assault or other heinous acts by its employees are extraordinary and they should be responsible only if the exact type of crime was noticed to be imminent. This case should help the Federal Government, the public and Federal Contractors to understand they should have ongoing procedures of contact with on-site supervisors and attend to the supervisors' warning that an employee has become unfit, capable of causing grave bodily

injury to others and should be removed back to the U.S.

II. Respondent's BIO Quoting Pittway Clearly Shows That There Is Division Among The Circuits Concerning Foreseeability of Grave Injury, Sexual Assault and Other Heinous Crimes

The Fourth Circuit rejected foreseeability for an employer for sexual assault by an employee in a remote land mainly based upon the Pittway Corp v. Collins, 973 A.2d 771 (Md. 2009) product liability case stating that there was an end to proximate cause where it would be highly extraordinary that the negligent conduct caused the harm. Pittway stated that 'foreseeability' is intended to reflect 'societal standards' of acceptable connection between the negligence and the ensuing harm.

> In applying the test of foreseeability...it is well to keep in mind that it is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm, and to avoid the attachment of liability where,..., it appears "highly extraordinary" the negligent conduct should have brought about the harm. Pittway at 778, BIO:19

In rejecting Petitioner's argument, the Fourth Circuit effectively rejected the Fifth Circuit's application of 'societal standard' in the Jones case which acknowledged a heightened standard for Federal Contractor employees working and living in harsh, difficult remote places. Jones "noted that ...employees working under the Defense Base Act," ..., in remote places where there are severely limited

recreational and social activities, ... are in different circumstances from employees working at home. Jones at 238. Cf. O'Keefe v. Pan American World Airways, 338 F 2d 319, 322 (5th Cir. 1964). Further, Jones reasoned that "If non-Halliburton/KBR employees were allowed in the area where the alleged assault occurred, and Halliburton/KBR employees had assaulted such a non-employee, that person obviously would have and actionable claim. Id. 240. In Jones the Plaintiff victim reported the dangerous situation where she was placed in living quarters in a partition room with a gap from the top to the ceiling part of the men's area and the only women's bathroom access required walking through the men's rooms.

The Fourth Circuit considered foreseeability of sexual assault a public policy reason for rejecting employer responsibility which the Court deemed impossible except when the employee's behavior clearly and unmistakably threatened imminent criminal sexual assault to a particular person. The Fourth Circuit reasoned legal causation is a policy-oriented doctrine and the Fourth Circuit considered sexual assault such a highly extraordinary and unforeseeable crime that BAH's alleged tortuous negligent retention and supervision could not proximately cause Petitioner's injuries. Pet:A12-13. This was despite warnings from the on-site supervisor in the remote land that the employee put her, her 11 year old dependent son and others at risk of imminent grave bodily injury unless the employee was returned to the U.S. Nevertheless, the Court stated: 'Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping

employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. Pet:A13.

A. Fourth Circuit Court Public Policy that Sexual Assault Is So Extraordinary That it Almost Always Precludes Federal Contractor Responsibility for its Employees in Harsh Overseas Working and Living Environment Is Erroneous

The Circuit Court discussed negligent retention responsibility elements indicating they were present. The Court made a public policy decision in the final stage of proximate cause, however, that societal standards are that sexual assault is so highly extraordinary and unforeseeable in all but the narrowest of cases it breaks the chain of proximate for employer responsibility. This contravenes the spirit of Federal Law specifically naming employer responsibility for sexual assault in negligent retention actions as a protected basis for civil litigation that a Federal [Defense] Contractor cannot require an employee to waive as a condition of employment even in the face of arbitration clauses highly favored under Federal law. This shows that sexual assault is not rare, unusual, extraordinary, and unforeseeable because it has happened enough that a Federal law has been written on the issue for Federal Contracts performed overseas.

The Fourth Circuit made public policy that societal standards made only specific notice of

imminent sexual assault (i.e. I am going to rape you now) supports negligent retention for sexual assault. Such notice is a physical impossibility in overseas harsh remote work and living environments where frequently the only contact with Federal Contractor US Headquarters is a call during U.S. business hours by the on-site supervisor half a world away and it defeats the purpose of the Federal law to preserve Federal Contractor responsibility. It also shows a clear conflict within the U.S. Appellate jurisdictions on whether recovery for sexual assault and negligent retention must be dealt with in the case of Federal contractors with employees overseas in high stress difficult work and quarters environment.

III. Petitioner's Factual Reply to Respondent's Continued Argument of the Facts

The Respondent argued the facts for which he should have filed a cross appeal challenging the 4th Circuit Court's findings. The standard for appealing finds of fact is very high. S. Ct. Rules 10(c) and 18.4. Petitioner's Reply to Respondent's continued argument of the facts is as follows. Petitioner said in deposition, "I don't think that there is any way that Booz Allen & Hamilton could have prevented this [rape] from occurring aside from sending Mr. Davenport home". JA:210, SJA:60 MB Dep Tr.248:10-249:12. Dependant Petitioner provisions were part of the Chief of Party's contract. He was BAH's Visa responsibility and an intimate part of the BAH Central Asia party. Pet: A22-24, JA69, 399. Petitioner was a normal, pleasant, precocious, child in the U.S. and Central Asia age 10-11 before he was raped. JA:482-3 Affidavits Surla and Zipman. Employees testified in deposition that he changed

dramatically for the worse after the rape in the second half of March 1996. JA:475,378.

Respondent knew about its employee because Respondent's June 2006 Request for Admissions [RFA] asked Petitioner to admit the assailant was its employee Davenport which Petitioner admitted. SJA433 RFA Answers 8/9/06.

The on-site Chief of Party supervisor told BAH the employee was in the middle of a divorce, was away from home an excessive period of time, and BAH needed to send him home to the U.S. before he committed grave bodily injury on her, her young dependant son or others. JA:458, JA:472, 473-5 Klouchnikov Affidavit. The employee's early March 1996 review said: he worked in a challenging, technically complex and harsh overseas environment; 2. he needed to develop his interpersonal and group support and coordination activities; 3. his flexibility and adaptability needed improvement; 4. he needed to gain a better understanding of superior-subordinate authority and support responsibilities; 5. [he had] a poor working relationship with his Chief-of-Party supervisor; and 5. he was overseas on assignment most of the ten months since his last review so that he could not complete BAH internal training needs scheduled for 1995-1996. Pet:A30-1, JA:496-500, JA:486-9.

The employee's Memorandum of Understanding [MOU] Overseas Assignment contract was for full time work on the US AID Bankruptcy Project in Kazakhstan and Kyrgyzstan from October 1, 1995 to September 30, 1996 JA:434, the same time as for the Chief of Party. JA:69. His hours in the Bankruptcy Project were reduced and replaced by another and he

was reassigned to other projects in early 1996. He was kept in Kazakhstan and Kyrgyzstan until he was returned home at the end of June 1996 before the projected September 1996 end of the Bankruptcy Project which continued overseas through November 1996 and was not renewed. The employee was a senior associate in 1995 and was still a senior associate as of his deposition in 6/28/07. JA:77 Davenport Tr Dep 6/2707; JA:107 BAH Rep Kirsch 6/8/07. The employee in his 1995 February 1996 self-assessments parts of his reviews showed his great upset.[2] Pet: A27-30.

IV. This Case Is An Excellent Vehicle for Giving Federal Rule of Civil Procedure [FRCP] 44.1 Proof of Law Guidance in the Expanding Global Markets and Political Arena Where Federal Contractors Execute U.S. Government Foreign Policy and Military Actions

This case concerning foreign law application to Federal Contractors is important to give guidance to Federal Contracting under [FRCP] Rule 44.1 where

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[2] Respondent refused to produce the employee's reviews, self-assessment and other documents until ordered and only produced them after several court orders, on 10/23/07 just before Petitioner's Opposition to Respondent's Summary Judgment Motion was due on 11/1/07 JA:11. By then it was too late for further deposition of the employee (deposition 6/28/07) or BAH representative Kirsch (deposition 6/8/07) who signed BAH's 2007 discovery production and reviewed the employee and his self-assessments for 1995 and 1996. Kirsch also stayed at the senior associate level from 1995 to 2007. Petitioner preserved the issue of producing employee records in deposition and the June 29, 2007 Status Report at close of discovery. JA:8 Petitioner continued to press for the employee's file through motions to compel which the court granted. JA:8-10.

foreign law does not offend U.S. public policy. Petitioner met proof of law standards for Kyrgyz law under Maryland lex loci delicti applying the law of the place where the tort occurred. Kyrgyz law at the time of the rape allowed the victim's civil case for employer responsibility for its employee's rape of Petitioner (then eleven) regardless of whether a criminal case had been brought or won. Kyrgyz law even expanded Petitioner's access to medical injury compensation as a child victim because it provided for recompense without relation to parental responsibility for such expenses.

That FRCP 44.1 standards for Proof of Law allow Petitioner's use of Kyrgyz law was presented on Appeal in Petitioner's Appellate Reply. Earlier Respondent misrepresented Kyrgyz law in its Declaration that cited now defunct Former Soviet Union statutes written in the 1960's and did not produce the cited law itself. Declarant's expert opinion was further flawed because it applied purported foreign law to the Amended Complaint facts to assert the case was procedurally barred rather than merely giving information to help the court determine the content of the applicable foreign law of Kyrgyzstan[3]. Respondent's Declaration incorrectly stated that unless the employer ordered the employee to rape the 11 year old dependant and a Kyrgyzstan Court criminally convicted the rapist, Petitioner would not be allowed to bring a civil case. This misrepresentation of Kyrgyz law skewed Plaintiff's opening appellate brief because such Kyrgyz law would be against Maryland public policy

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[3] See Minebea Co., Ltd v. Papst, 444 F. Supp. 2d 68, dismissed, 224 Fed. Appx. 962, 2007 WL 1492272 (D.D.C. 2006)

to allow a cause of action where foreign law was so harsh and far from U.S. standards[4]. It took over a year to secure the actual Kyrgyz Law the Declaration cited to show that Respondent's Declaration could not be further from the truth which Petitioner reported and argued in his Appeal Reply which produced the laws cited in the official Russian language and English translation.[5]

Cases interpreting FRCP 44.1 apply to the issues at hand. A party's foreign law notice acts as notice for both parties allowing evidence from both at varying stages.[6] Proof can be given at the Appellate stage[7] most particularly when there is a good reason[8]. A Court of Appeals exercises plenary review and it is not confined to information available to or considered by the district court.[9] Law in effect at the time of injury controls[10] If a Declarant foreign law expert quotes now defunct law of her country, she should have a copy of the law to read before she

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[4] Films by Jove, Inc. v Berov, 250 F. Supp. 2d 156 (2003), motion to vacate denied, 341 F. Supp 2d 199 (2004).

[5] Reply Appendix Translated Certified Am. Trans. Assoc. Translators. Respondent not contending error Court assume correct. Forzley v. AVCO Corp. Electronics Div., 826 F.2d 974, (11th Cir. 1987)

[6] FRCP 44.1 Advisory Committee Notes 1966 Adoption

[7] Stuart v. U.S., 813 F.2d 243, certiorari granted, 108 S. Ct. 1592, 485 U.S. 1033, 99 L. Ed. 2d 907, reversed on other grounds, 109 S. Ct. 1183, 489 U.S. 353, 103 L. Ed. 2d 388, on remand 872 F.2d 929 (9th Cir. 1987).).

[8] Infra FN6.

[9] Grupo Protexa, S.A. v. All American Marine Slip, a Div of Marine Office of America Corp., 20 F.3d 1224 (1994) rehearing and rehearing in banc denied, cert. den., 115 S. Ct. 481, 513 U.S. 986, 130 L. Ed. 2d 395 (1994)

[10] Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L., 422 F. Supp. 405 (N.D. Ill. 1976)

gives her opinion on it and should include it with her Declaration as is considered normal[11]. Without a copy of the law Petitioner could not comment but to say the Declaration on its merits was inadequate proof of law. In the West the ability to obtain a defunct law from the remote defunct Kyrgyz Soviet Socialist Republic of the defunct Former Soviet Union [Union of Soviet Socialist Republics (USSR)] written fifty years ago under the 1936 USSR Constitution is extraordinarily difficult. After searching for over a year, Petitioner finally obtained the law from the U.S. Library of Congress, and the Assistant Director of the Law Library who speaks Russian verified it. Petitioner submits this is good cause.

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[11] U.S. v. Pre-Columbian Artifacts, 845 F. Supp. 544 (N.D. Ill. 1993).

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Baker's petition for writ of certiorari, the Court should grant the writ of certiorari.

Date: September 9, 2010

Respectfully submitted,

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REPLY APPENDIX
KYRGYZ LAW

The Law Verified by Library of Congress in Russian Pet A35-36; Trans A Pet A-32, 35 Criminal Law

Article 112. Pederasty (Sodomy)

Pederasty is punished by imprisonment for a period up to two years.

Pederasty committed using violence or in relation to a minor or where the victim is a dependent is punished by imprisonment for a period of from two to six years.

Criminal Procedure

Article 135. Filing of a Civil Action

1. A person who has suffered harm from a crime or an act by an insane person which is forbidden by the Criminal Code of the Kyrgyz Republic, or his representative has a right to bring a civil case at the same time as the criminal case but not after the beginning of the legal hearing.

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3. A PERSON WHO HAS NOT FILED A CIVIL ACTION DURING A CRIMINAL PROCESS, BUT HAS NOT HAD THE ACTION EXAMINED BY A COURT, HAS THE RIGHT TO FILE A CIVIL CASE.

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Civil Procedure

Article 65 Basis for Releasing the Need for Further Proof

1. Facts recognized by the Court as well known are not required to be proved.

2. A Court is required to adopt decisions by a court in an earlier civil case, they are not to be argued again and they are not subject to challenge during the litigation of the later civil action in which the same people are parties.

3. A Court trying a case about the civil and legal consequences of the actions of a person sentenced by a court in a criminal case must accept the criminal verdict as proof that the illegal actions causing a criminal conviction were committed by the defendant.

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Respondent's Declaration without production of the law

9. In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure by means of: (i) a ruling of a court; and (ii) a court sentence. See **Art. 112, Criminal Code of the Kyrgyz SSR (1996)**, constituted by the Law of the Kyrgyz SSR (dated Dec. 29, 1960), expired pursuant to the Law of the Kyrgyz Rep. #69 (dated, Oct. 1997); see also **Art. 135 Criminal Procedure Code of the Kyrgyz Rep.** (dated June 30, 1999); **Clause 3, Art 65, Civil Procedure Code of Kyrgyz Republic** #146 (dated, Dec. 29, 1999).

Civil Code Sections454,455, 465 etc
Law Library of Congress Verified

OBLIGATIONS ARISING AS A CONSEQUENCE OF CAUSING HARM

Article 454 General basis for liability for harm caused

Harm caused to the person or property of a citizen or harm caused to an organization shall be made in good in full measure by the person causing the harm.,,, Translated by Paul W. Merriam, American Translator's Association Certified Translator, Russian to English August 4, 2008 add resp 30-32

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Article 455 Responsibility of an organization for harm caused through the fault of its workers

An organization must compensate harm which is caused through the fault of its workers during the fulfillment by them of their work (service) responsibilities.

Article 464 Responsibility for harm caused by a source of increased danger

Organizations and citizens, whose activity cause increased danger to others ...are obligated to compensate harm which is caused by the source of increased danger ....

Article 465 Responsibility for Harm Jointly Caused by Several Persons

Persons, who have caused harm jointly bear joint and several liability for the losses (casualties).

Article 475. Compensation for Harm to the Health of a Citizen Who Has Not Reached 15 Years of Age

In the case of damage to a citizen's health who has not reached fifteen years of age and who has no income, the organization or citizen who is responsible for the harm is obligated to compensate expenses connected with the harm to the victim's health.....

Respondent's Declaration without production of the law

¶4.I have reviewed the Amended Complaint....I...make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

¶7.[A] legal entity shall be responsible for its employee's action or inactions, if that employee has caused harm to third parties in the course of performance of his or her employment obligations. Art. 455 Civ. Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated, July 30, 1964) expired pursuant to the Law of the Kyrgyz Rep. #2 (dated Jan. 5, 1998)

¶8.Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's action or inactions unless the predicate act, which must have resulted in criminal sanctions, was completed upon the employer's order and control. Art 455 Civ. Code of Kyrgyz SSR (1996) Id.

Learned Treatise, Professor Chris Osakwe. Pet A-39-40 An Examination of the Modern Soviet Law of Torts, 5 Tul. L. Rev. 3 (1979) presently Professor of Law at Moscow University.

[T]his study attempts to bring together in one comprehensive piece Soviet statutory law, case law, and doctrine dealing with all aspects of the contemporary Soviet law of torts. ... Pet A-38-39

A composite picture of the modern Soviet law of vicarious tort liability ... First, the employer is vicariously liable for the tort (based on intent, negligence, or strict liability) committed by its employee in the scope of his employment. Second, the employer, for purposes of vicarious tort liability may be a physical or juridical person. Third, the determination of what constitutes "acting in the scope of employment" must be made on a case by case basis. In making its determination, the fact finder must consider the nature of the business, the accepted custom among those who engage in such business, and any other relevant factors...Fourth, if it is determined that the employee had abandoned the master's business when the tort occurred, the master may still be held liable if it is shown that the employer was negligent in the selection of the employee or that the employee violated a non-delegable duty. Fifth, any tort committed by an employee on the premises of the employer's business or at any other place where the employee customarily works is presumed to have been committed within the scope of the employment, and consequently, the employer is vicariously liable...

Respondent's Declaration opinion on facts without production of the law

¶4 I have reviewed the Amended Complaint...I ...make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

¶10. The allegations of the Amended Complaint do not indicate that buggery has been established by the required criminal procedures identified in Paragraph 9. Pet A-42

¶11. In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages caused by its employee to a third part only in the course of performance by such employee of his/her employment obligations or official duties an employer cannot be held responsible for a criminal act (i.e., buggery) committed by the employee, unless the ct is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint. Pet A-42-43

Baker v Booz Allen Hamilton Fourth Circuit Court Opinion Pet A:12-13

"Once causation-in-fact is established, the proximate cause inquiry turns to whether the defendant's negligent actions constitute a legally cognizable cause of the plaintiff's injuries. This part of the causation analysis requires us to consider whether the actual harm to the plaintiff falls within a general field of danger that the defendant should have anticipated or expected. Stone v. Chicago Title

Ins. Of Md., 624 A.2d 496, 500 (Md. 1993). Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established. Pittway, 973 A.2d at 787. The question of legal causation most often involved a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. Id. at 788 Other public policy considerations that may play a role in determining legal causation include the remoteness of the plaintiff's injury from the defendant's negligence and the extent to which the injury is out of proportion to the defendant's culpability. Id.

In our view, the injury in this case (Sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport. The injury suffered by Baker was criminal sexual assault. Baker argues that this sexual assault was a foreseeable result of Davenport's "explosive behavior in the workplace. We disagree. Without question, Davenport's demeanor at work was offensive. Slapping fellow employees is deplorable. However, BAH reasonably can assume that an employee who has slapped fellow employees on occasion will not sexually assault the child of an independent contractor of BAH. Therefore, BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim. Slapping a fellow employee simply does not inexorably lead to criminal sexual assault.